Report to the Appellate Process Task Force on the Superior Court Appellate Divisions

Ad Hoc Task Force on the Superior Court Appellate Divisions
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Chapter 1.
Executive Summary

During the deliberations of the Appellate Process Task Force, it became clear that a thorough review of the resources available to, and procedures employed by, the appellate division of the superior courts was in order. The Appellate Process Task Force requested that an ad hoc task force examine the appellate divisions, and in response, the Chief Justice appointed the Ad Hoc Task Force on the Superior Court Appellate Divisions (hereinafter referred to as the "Appellate Division Task Force" or as the "Task Force"). The membership of the Appellate Division Task Force is as follows:

Justice William F. Rylaarsdam (Chair)
Court of Appeal, Fourth Appellate District
Justice Kathryn Doi Todd
Court of Appeal, Second Appellate District
Judge Philip Champlin (Ret.)
Napa Superior Court
Judge James L. Warren
San Francisco Superior Court
Ms. Beth Ann Lane
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Mr. Dennis A. Fischer
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Staff support to the Appellate Division Task Force was supplied by Mr. Joshua Weinstein, Staff Attorney at the Administrative Office of the Courts, and Professor J. Clark Kelso of the University of the Pacific McGeorge School of Law.

The Appellate Division Task Force was given the following charge:

> The charge to the Ad Hoc Task Force on the Superior Court Appellate Divisions is to study the constitutional requirements, statutory provisions, and rules of court governing the appellate division of the superior court to evaluate court organizational structures, including subject matter and geographical jurisdiction, judicial assignments to the appellate division, support staff needs, workloads, and the concerns of peer review. The task force shall report to the Appellate Process Task Force, recommending how the jurisdiction, structure, functions, assignments,

staffing, and workload might be revised to enhance the efficiency of the court, the consistency and quality of the work product, and the independence of the appellate divisions of unified courts.

The Appellate Division Task Force collected information about appellate divisions from a wide variety of sources. Collectively, the members of the Task Force themselves have substantial experience with appellate divisions. All four judges on the Task Force have previously served as judges on appellate departments, and one member of the Task Force currently serves a research attorney to an appellate division. The Task Force includes among its members two practitioners, one with primarily criminal experience and the other with primarily civil experience, both of whom have handled matters before the appellate division.

In addition, the Task Force circulated to all counties a written survey of appellate division practices and procedures. Survey responses were returned by all except two counties, and the responses provided a great deal of useful information concerning the operations of the various appellate divisions. The survey solicited information about (1) selection of appellate division judges, (2) appellate division staff support, (3) work load characteristics, and (4) work product. A copy of the survey instrument is reproduced in Appendix A, and survey results are reproduced in Appendix B.

Finally, after beginning to formulate some tentative recommendations, representatives from the Task Force made a presentation at the annual meeting of judges from rural counties (commonly known as the CJER's "Cow Counties Institute") and received some initial reactions from those judges.

The Task Force divides its analysis, report and recommendations into the following seven categories:

A. Structure and Jurisdiction
B. Selection and Training of Appellate Division Judges
C. Appellate Division Staffing and Training for Staff
D. Facilities
E. Workload Characteristics
F. Work Product
G. Rules Governing the Appellate Division

The Appellate Division Task Force recognizes that the recommendations in this report are not fully developed nor ready for implementation. Indeed, there are areas that require further legal research and possible constitutional, legislative, or rules changes. Rather than fully developing those models, the Task Force is forwarding this report and the recommendations to the Appellate Process Task Force. The Appellate Process Task Force will be asked to evaluate the recommendations and develop those that are deemed

appropriate. We anticipate that the recommendations that are embraced by the Appellate Process Task Force will be fully developed with appropriate recommendations for necessary constitutional, statutory or rule changes.

The recommendations of the Appellate Division Task Force are:

Category	Findings	Recommendations
Structure & Jurisdiction	1(a). The implementation of trial court unification has created a problem, both actual and in terms of public perception, of "peer review" in appellate divisions. 1(b). Trial court unification has resulted in significant problems, particularly in smaller counties, caused by conflicts where the judge who normally would handle the appeal has had some part in handling the case at the trial court level. 1(c). Except for the larger counties, there are problems in assigning judges and scheduling oral argument for the appellate division. --- 2. Problems are quite different in the small counties from those in the larger counties; procedures which might work in the larger counties would not work in the smaller counties.	1. Create six appellate divisions that are structured along the same lines as the existing Court of Appeal districts by using the Chief Justice's power to assign judges to the appellate division (including the power to assign judges from one county to another county's appellate division). The creation of a district-wide appellate division will virtually eliminate peer review and case conflicts, and will provide a set of appellate division judges dedicated to the appellate function. --- 2. Tailor each of the six appellate division districts in light of the differences between the Court of Appeal districts with respect to, among other things, geographic considerations, the number of counties within the district, and the caseload.

Appellate Division Judges	3. The criteria for the selection of judges serving in appellate divisions are unclear, and the actual nomination process varies among the counties. --- 4. A significant number of judges express the need for training in handling appeals.	3. Amend Rule 100.5 of the Rules of Court to include specific procedures for nominating appellate division judges for consideration by the Chief Justice. Under the amended rule, the presiding judge of each superior court would make nominations for the appellate division and the Administrative Presiding Justice of each Court of Appeal district would report to the Chief Justice evaluating the superior court nominees within the district. --- 4. The Center for Judicial Education and Research ("CJER") should: a. create an orientation curriculum for newly-appointed appellate division judges. b. prepare a manual or deskbook for appellate division judges. c. invite appellate division judges to all regular CJER programs for appellate judges.
Appellate Division Staff	5. There is wide variation in the extent of clerical personnel, court clerks and research attorney support. Many appellate divisions have no dedicated clerical staff or research attorney support. --- 6. There is no training for the staff that does exist.	5. Create appropriate clerical personnel, court clerks and research attorney support for each district-wide appellate division. --- 6. CJER should develop appropriate training programs for clerical personnel, court clerks and research attorneys.
Facilities	7. The appellate divisions in nearly all counties lack appropriate facilities for holding hearings before a three-judge panel.	7(a). Facilities needs of the appellate division should be considered when planning new courthouse or courtroom construction. 7(b). When possible and convenient, Court of Appeal districts should make their courtrooms available to the appellate division.

Workload	8. There are significant variations between counties in the types of cases being appealed and the volume of appeals. --- 9. The settled statement procedure under Rules 127 & 187 is generally unsatisfactory. --- 10. A substantial percentage of all appellate division matters involve appeals from traffic infractions in which the issues are factual. Under recent amendments, these cases may be heard by a single appellate division judge.	8. Creation of district-wide appellate divisions should reduce the workload disparities between appellate divisions. --- 9. Require settled statements only on standards consistent with Rule 7. --- 10. Appeals from traffic infractions should be heard by a single appellate division judge with the record on appeal initially limited to the opening brief of appellant. An appeal would be dismissed without further record preparation or briefing unless the brief establishes that reversible error has occurred, in which case ordinary preparation of the record and briefing of the appeal would be permitted.
Work Product	11. There are significant variations in the manner in which cases are handled and decisions are made and reported in different counties.	11. Require written opinions, which may be memorandum opinions, or minute orders with reasons stated, in all causes.
Rules of Court	12. The rules governing appeals in limited jurisdiction cases are obsolete and need to be revised; revised rules should minimize differences between appeals to the Court of Appeal and the appellate divisions. --- 13. New rules are needed to govern the writ proceedings which now go to the appellate divisions.	12. The appellate division rules should be merged into the rules applicable to the Court of Appeal and the Supreme Court, with the goal of making as few exceptions for appellate division procedures as possible. --- 13. Apply to appellate division existing Court of Appeal and Supreme Court rules regarding writs.

Chapter 2.
Task Force Findings

A. Structure and Jurisdiction

1. Description Under Current Law

Until the 1998 passage of Proposition 220 (trial court unification), appeals from municipal courts were taken to the superior court pursuant to Article VI, Section 11of the California Constitution. *See* former Cal. Const., art. VI, § 11 ("Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties."). Many of these appeals were handled by the statutorily-created appellate department of the superior court. *See* former C.C.P. § 77(a) ("In every county and city and county, there is an appellate department of the superior court consisting of three judges or, when the Chairperson of the Judicial Council finds it necessary, four judges.").

Proposition 220 replaced the appellate departments in each superior court with a constitutionally-established appellate division. *See* Cal. Const., art. VI, § 4 ("In each superior court there is an appellate division."). Article VI, Section 11 of the California Constitution provides for the appellate jurisdiction of the appellate division as follows:

> (a) The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute. When appellate jurisdiction in civil causes is determined by the amount in controversy, the Legislature may change the appellate jurisdiction of the courts of appeal by changing the jurisdictional amount in controversy.
>
> (b) Except as provided in subdivision (a), the appellate division of the superior court has appellate jurisdiction in causes prescribed by statute.

Pursuant to statutes enacted to implement Section 11(b), appeals in limited civil cases (*see* C.C.P. § 86 (listing "limited civil cases")) and in misdemeanors and infractions are handled by the appellate division of the superior court. *See* C.C.P. § 904.2; Penal Code § 1466. These statutes have the effect of essentially preserving the prior practice of having appeals in the specified cases heard by the appellate division instead of being appealed to the Court of Appeal even though these cases are now tried in the superior

court. If an appellant files an appeal in the wrong court, the current practice is for the appellate court to transfer the appeal to the proper court.

In a change from prior practice, the appellate division was also given writ jurisdiction in unified counties pursuant to Article VI, Section 10 as follows:

> The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction.

There were several reasons for giving the appellate division constitutional stature in Proposition 220. After a prolonged period of discussion and analysis, it was decided by the author of Proposition 220, then-Senator Bill Lockyer, that appeals from a unified superior court in cases that formerly had been within the jurisdiction of the municipal court should continue to be heard by a special division of the superior court instead of being appealed to the Court of Appeal as is normally the case with causes over which the superior court exercises original jurisdiction. In light of this policy decision, the drafters of Proposition 220 decided to make the appellate division a constitutionally-recognized court for three reasons:

1. In view of the appellate division's unusual jurisdiction (i.e., it would be exercising appellate jurisdiction over cases arising in the same superior court as the appellate division itself), the drafters believed it was important to establish the court and the basis for its appellate jurisdiction in the Constitution. *See* Cal. Const., art. VI, §§ 10 & 11.

2. It would promote the independence of the appellate division to include within the Constitution general criteria to be used by the Chief Justice for making appointments to the division. *See* Cal. Const., art. VI, § 4 ("The Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence of the appellate division.").

3. Establishing the appellate division in the Constitution would heighten its visibility and importance which, in part, responded to concerns that had been expressed about the problem of "peer review" (i.e., judges from the superior court serving on the appellate division who would be reviewing decisions by other judges from the same superior court).

The California Law Revision Commission was charged with the responsibility of drafting legislation to implement Proposition 220. Although members of the Commission expressed serious reservations about the problem of peer review and the

issue of whether appellate divisions had the requisite resources to perform their functions, the Commission ultimately decided not to recommend any substantial variations from the past structure or practices of the former appellate departments. This decision was made in part because the Commission had originally decided to make as few substantive changes in the implementing legislation as possible and in part because the Commission's consultant, Professor Clark Kelso, indicated that he would be recommending to the Judicial Council and the Appellate Process Task Force a reevaluation of the appellate divisions. The Appellate Division Task Force was created to conduct that reevaluation.

In order to implement the Commission's decision to make as few substantive changes as possible, the implementing statutes were drafted so that the structure of the appellate divisions under Proposition 220 was kept essentially the same as the structure of the former appellate departments. Under current law, the appellate division in each county consists of three judges, or, "when the Chief Justice finds it necessary," four judges. C.C.P. § 77(a). One of the judges assigned to the appellate division is designated as the presiding judge of the appellate division. *Id*. For the appellate division in each superior court, the Chief Justice may assign "a judge of that court, a judge of the superior court of another county, or a judge retired from the superior court or a court of higher jurisdiction in this state." *Id*. Judges serve on the appellate division "for the period specified in the order of designation." C.C.P. § 77(c). The presiding judge "shall convene the appellate division when necessary." C.C.P. § 77(d). No more than three judges of the appellate division may participate in a decision and the concurrence of two judges is required to render a decision in every case. C.C.P. § 77(b), (d). Pursuant to recent legislation, an appeal from conviction of a traffic infraction may be heard and decided by one judge of the appellate division. C.C.P. § 77(j). This change reflects the reality that the bulk of traffic appeals involve purely factual questions where the benefits of a three-judge panel are minimal.

This history supports two important conclusions: First, implicit in Proposition 220's provisions dealing with the appellate division is a recognition that combining trial and appellate functions within the same superior court may undermine the appearance of impartial appellate justice. That was why it was believed necessary to give the appellate division a constitutional basis and to include a provision addressing the Chief Justice's appointment power. Second, the fact that the statutory implementation package drafted by the California Law Revision Commission essentially retained the prior structure of the appellate department did not reflect the Commission's judgment that the prior structure was the best structure; in fact, some of the members of the Commission had serious reservations about that structure but deferred consideration of the issue to give the Judicial Council the opportunity to address it. Thus, the Appellate Division Task Force confronts a situation where serious concerns have previously been raised about the structure and operations of appellate divisions, and neither Proposition 220 nor its implementing legislation purports to address those concerns comprehensively.

2. The Problem of "Peer Review" and Disqualifying Conflicts

Echoing the concerns expressed by members of the California Law Revision Commission and by members of the bar around the State, the Appellate Division Task Force concludes that the appearance of impartial appellate justice at the superior court level is seriously threatened in many counties because of (1) negative perceptions associated with "peer review" (i.e., judges on the appellate division of a superior court reviewing decisions by their colleagues on the same superior court), and (2) the frequency with which appellate division judges in many counties have disqualifying conflicts arising out of prior involvement with a case.

The problems associated with peer review and the likelihood of a substantial number of disqualifying conflicts were expressly mentioned by the California Law Revision Commission in its report on SCA 3, the predecessor to Proposition 220. In fact, it is fair to characterize the Commission's report as not so much endorsing the appellate division concept as recognizing that the available alternatives at the time posed even more serious obstacles. In particular, the Commission considered the following alternatives: (1) directing all appeals to the Courts of Appeal; (2) creating upper and lower divisions within the superior court; (3) requiring appeals from the superior court in one county to be heard by the superior court in an adjoining county; and (4) creating an appellate division within the superior court. *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1, 28-31 (1994). Of these four, the least objectionable at the time was to create a constitutionally-recognized appellate division within the superior court. However, the Commission's report does not expressly endorse this proposal, and the report includes the following warning:

> The primary concern with appellate jurisdiction within the unified court is the problem of conflicts of interest arising in peer review. A judge should not be in a position of having to reverse a judge of equal rank. There may be a collegiality or deference on the court that will destroy the independent judgment necessary for a fair review.

Id., 24 Cal. L. Revision Comm'n Reports at 30.

The Appellate Division Task Force agrees with this assessment and is prepared to go further. Having examined the operation of appellate divisions around the State, it is clear that the appearance of impartial appellate justice is undermined by the current structure, particularly in counties with relatively few superior court judges.

Consider, for example, a county with only four judges (there are 15 such counties in California). In a four-judge superior court, three of the judges constitute the appellate division. Assuming an essentially random assignment of cases to the judges of the court for all purposes, we can expect a disqualifying conflict on the appellate division because

of prior judicial involvement with a case in 75% of the appeals. In practice, courts have handled this problem with what amounts to a game of judicial "musical chairs." The three-judge appellate division hears the first case. In the next case set for oral argument, one of the judges is disqualified, and the superior court's other judge takes his or her place at the bench. In the next case set for oral argument, the process repeats again, perhaps this time with a different member of the appellate division being disqualified. Yet at the end of the day, all four judges essentially leave the bench together and, from a litigant's perspective, all four judges go into chambers to decide the day's appeals. Whether the judges repeat the game of musical chairs in chambers is left to the litigant's imagination.

It is virtually impossible to maintain for the public and the bar the appearance of impartial appellate justice in light of the practical reality of frequent disqualifying conflicts. Moreover, it is not a problem limited to just the fifteen smallest courts. Twenty-five superior courts in California have 6 or fewer judges, and thirty-four superior courts have 9 or fewer judges. Although the odds of a disqualifying conflict decrease as the number of judges increase, the statistical frequency remains disturbingly high (e.g., 33% in a 9-judge court).

Even in counties with many judges, it can be difficult to maintain the appearance and reality of independence when the judges who serve on the appellate division one or two days out of the month spend the remainder of the month working as colleagues with the very same judges whose decisions are reviewed by the appellate division. It appears that the only exception to this criticism is the appellate division in the Superior Court of Los Angeles. The appellate division in Los Angeles does not suffer from the same independence problems because of the extraordinarily large number of judges in the county, because the judges assigned to the appellate division in Los Angeles work full-time on handling appeals and writs, and because the appellate division has separate facilities dedicated for the full-time use of the appellate division. These characteristics separate and distinguish the judges on the appellate division in Los Angeles from the other judges on the court.

B. Selection and Training of Appellate Division Judges

Pursuant to Section 4 of Article VI of the California Constitution, "[t]he Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence of the appellate division."

As a practical matter, each superior court nominates judges to serve on the appellate division, and the Chief Justice generally appoints the judges nominated by the court. The nomination process varies among counties. In 34 counties, the presiding judge of the superior court decides who to recommend for service on the appellate

division. In 6 counties, the appellate division is treated as a rotating assignment within the court. In 3 counties, service on the appellate division is determined by seniority. In 2 counties, the entire court votes to select the nominees. Other processes are used in 10 counties.

There appears to be no systematic training for judges who are assigned to the appellate division. No programs have been designed by the Center for Judicial Education and Research ("CJER"), and appellate division judges are generally not invited to participate in the existing CJER programs for appellate judges.

C. Appellate Division Staffing and Training for Staff

There is substantial variation in the amount of clerical personnel, court clerk and research attorney support for judges on the appellate division. In 30 counties, the appellate division has some dedicated clerical and staff support other than research attorneys, but in 21 counties, the division has no independent clerical or staff support. In 24 counties, the appellate division has research attorney support, but the appellate division in 27 counties even lacks research attorney support.

As noted above, in counties with fewer than ten judges, there exists a substantial problem of disqualifying judicial conflicts because a judge assigned to the appellate division may have been involved with a case on appeal to the appellate division. This same problem exists with respect to research attorney conflicts. When a court has only a small number of research attorneys, there is a substantial likelihood that a research attorney assigned part-time to assist the appellate division may have had some prior involvement with cases on appeal. The same research attorney who advised the trial judge may find herself asked to assist the appellate division in determining whether the trial judge committed error. This creates the potential for unacceptable conflicts.

As is the case with appellate division judges, there is no planned training for research attorneys who will be serving the appellate division.

D. Facilities

Given the small amount of time which most courts devote to appellate division business, it is no surprise that, except for Los Angeles, there are no special facilities dedicated to appellate division judges. Instead, when an appellate division holds a session to hear oral argument, it simply uses an available courtroom in the superior court. Unfortunately, a trial bench is not particularly well designed to be used by a three-judge panel. As a result, the three judges must attempt to crowd themselves behind a bench that is designed for only one judge or, in those courts where it is simply impossible for three judges to fit behind a trial court bench, make alternative arrangements within the court.

Los Angeles, with its full-time appellate division, is the exception. The appellate division in Los Angeles has been assigned its own courtroom which has a bench designed to accommodate three judges.

E. Workload Characteristics

The work load of the appellate divisions as reported in 1999 in response to the Task Force's survey varies tremendously from county to county. Seventeen counties reported having 12 or fewer appellate division decisions. Only eight counties reported over 100 appellate division decisions annually (Alameda, Kern, Los Angeles, Marin, Orange, San Diego, Santa Clara, and Ventura). Los Angeles and San Diego had, by far, the greatest number of cases, with both counties reporting an annual caseload of around 1,000 decisions. The next two largest caseloads were in Marin (374 decisions) and Orange (350 decisions) counties. These differences in raw numbers reflect fairly closely the differences in the number of limited civil actions, misdemeanors and infractions tried within the superior court of each county. Overall, there is a high correlation (79%) between the appellate division's caseload and the caseload in the superior court of limited civil actions, misdemeanors and infractions.

Thirty-nine appellate divisions reported that their members spend 5 hours or less per month in connection with appellate division duties. Three courts reported 5 to 10 hours per month, five courts reported 10-15 hours per month, three courts reported 15 to 20 hours per month, and only two courts reported more than 40 hours per month. The Los Angeles appellate division has four judges assigned to it who work full-time on appellate division matters. It is the only full-time appellate division in the state.

Thirty-six of the appellate divisions report meeting only once a month to handle their work. The Los Angeles appellate division is the only court which meets more than once a month, with oral argument scheduled twice a month, and meetings between the full-time judges more frequently. The remaining appellate divisions meet less than once a month on an as-needed basis. *Compare* Rules of Court 101 ("The appellate department of a superior court shall hold one or more regular sessions each month at a time or times and at a place to be determined by the judges of the department"). On average, appellate division judges spend 5 hours or less per month in oral argument. The sole exception is the Los Angeles appellate division which spends 5 to 10 hours in oral argument per month.

About half of the counties indicated that the cases handled by the appellate division are usually not accompanied by a reporter's transcript, which reflects the trial court's inconsistent use of reporters when hearing limited civil and misdemeanor cases and infractions. Instead, the parties use a "settled statement" which is created pursuant to Rules 127 and 187. The settled statement process is generally unsatisfactory, especially when the parties are unable to agree upon what transpired during the proceedings. When

disagreement occurs, the parties present the disagreement to the judge who presided over the trial proceedings, and that trial judge is then forced to devote precious time and resources to a difficult process of recalling and reconstructing a trial record.

The type of cases being appealed also varied tremendously from county to county. In a number of counties, the percentage of traffic infraction appeals was between 40 and 60 percent of the total appellate division caseload, while the percentage of traffic appeals in other counties was below 10 percent. Appeals from misdemeanor convictions was as high as 60 to 70 percent in about a dozen counties, while another dozen reported misdemeanor appeal rates below 25 percent.

As mentioned above, Proposition 220 changed the way writs are handled in limited civil cases and misdemeanors and infractions. Prior to Proposition 220, writs from municipals courts were handled by a single judge in the superior court. Proposition 220 changed the process so that writs in limited civil cases and misdemeanors and infractions would be heard by the appellate division. This change will increase the workload of the appellate division.

F. Work Product

There are significant work product variations among the counties. Forty counties reported that their appellate division issues written decisions with explanations, but ten counties indicated that decisions were not routinely accompanied by a written opinion. Only eight counties had guidelines regarding written opinions. Five of the appellate divisions report posting tentative decisions prior to oral argument.

Written opinions by appellate divisions are rarely published. Forty-five courts reported issuing no published opinions in 1999, four courts issued one published opinion, and only one court reported issuing 4-5 published opinions.

During 1999, eleven of the appellate divisions report certifying for transfer cases to the Court of Appeal pursuant to Rules 62 and 63, while thirty-five of the courts indicated that no cases were certified for transfer. Of the eleven, five courts reported one certification, four courts reported two certifications, and one court reported four certifications (one court did not indicate the number of certifications).

G. Rules Governing the Appellate Division

The California Rules of Court governing appeals are split into two divisions: Rules 1 to 80 relate to the Supreme Court and Courts of Appeal; Rules 100-191 relate to appeals to the superior court and appellate division of the superior court. Although these rules cover essentially the same subject matter, there are differences in the details. A few examples will illustrate some of the major differences:

Subject Matter	Appellate Division	Supreme Court & Court of Appeal
Notice of Appeal	Time for Filing: 30 days after mailing of entry of judgment. Rule 122(a).	Time for Filing: 60 days after mailing of entry of judgment. Rule 2(a).
Record on Appeal	Settled statement if desired by appellant. Rules 127 & 187.	Reporter's and Clerk's Transcript. Rules 4 & 5. Settled statement only in very limited circumstances. Rule 7.
Briefing	Opening brief 20 days after filing record; Respondent's brief 20 days later; Reply brief 10 days later. Rule 105(a).	Opening brief 30 days after filing record; Respondent's brief 30 days later; Reply brief 20 days later. Rule 16(a).
Oral Argument	No applicable rule.	**Time limits, order of arguments, and counsel. Rules 22 and 22.1.**
Written Opinion	Written opinions only when court deems it advisable or in the public interest. Rule 106.	Written opinion required in all causes. Cal. Const., art. VI, § 14.

The appellate division rules have not been significantly amended in light of the passage of Proposition 220 and the nearly complete unification of California's trial courts. The failure to enact implementing amendments to the rules has not caused much confusion because Proposition 220 maintained most of the procedural characteristics of what formerly were known as the appellate departments. Accordingly, the only Proposition 220-related amendment to the rules is found in Rule 100 which now provides as follows:

> All references in the California Rules of Court to "appellate department" mean "appellate division." Rules that apply to an appeal taken from a municipal court judgment to the appellate division of the superior court apply to an appeal taken from a unified superior court (trial court) judgment to the appellate division of the unified superior court (reviewing court).

Although Rule 100 takes care of most procedural issues involving the appellate division, there appears to be a gap in the rules with respect to writ practice. Prior to

Proposition 220, writs from a justice or municipal court were filed in the superior court and were handled by a writ department of the superior court. Proposition 220 changed this practice and expanded the appellate division's jurisdiction to encompass writs directed to the superior court in cases that formerly were within the jurisdiction of the municipal and justice courts. To date, however, the Rules of Court have not been amended to regulate the procedure and practice of writs in the appellate divisions.

Chapter 3.
Task Force Recommendations

A. Structure

1. District-Wide Appellate Divisions

Consistent with historical practice, Proposition 220 establishes a single appellate division in each superior court with appellate jurisdiction over municipal courts within the county and, in counties with unified trial courts, over cases that used to be within the jurisdiction of the municipal courts of the county (i.e., limited civil cases, infractions and misdemeanors). Cal. Const., art. VI, § 4. In other words, the geographic jurisdiction of an appellate division is coextensive with the geographic jurisdiction of the superior court (i.e., the county). This allocation of county-specific geographic jurisdiction to the appellate division made sense in the context of a multi-tiered system of trial courts within each county. In a county which had both superior and municipal courts, there was a logical jurisdictional connection between the appellate jurisdiction of the county-wide superior court over the municipal courts within the county. In addition, the problem of "peer review" in a multi-tiered system is substantially reduced or entirely eliminated.

However, in light of the unification of the trial courts in California, the logical jurisdictional connection between superior and inferior courts within a county has been broken, and the problems of peer review are now presented in most counties. It is thus appropriate at this time to consider alternative jurisdictional structures for the appellate division. Although Proposition 220 technically established a single appellate division within each superior court, the drafters were aware of the possible desirability of alternative structures and expressly acknowledged that such structures could be achieved as a practical matter by using the Chief Justice's appointment power. See C.C.P. § 77. Thus, for example, the California Law Revision Commission's report on SCA 3, the predecessor to Proposition 220, explained that "[r]eview by a panel of judges might include judges assigned from another county in appropriate circumstances, or even by a panel of appellate division judges from different superior courts who sit in turn in each of the superior courts in the 'circuit.'" *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1, 77 (1994).

The Task Force is convinced substantial improvements in the administration of justice will be achieved by conceptually restructuring the appellate divisions along the same geographic lines as the courts of appeal. That is, instead of having fifty-eight appellate divisions each of which is staffed by judges from the county in which the appellate division sits, appointments would be made to each of the appellate divisions

within a district so that, as a practical matter, there would be only one appellate division within a Court of Appeal district. For example, the Court of Appeal for the Sixth District encompasses four counties: Monterey, San Benito, Santa Clara and Santa Cruz. Instead of having four different appellate divisions and twelve appellate division judges within the district, the Chief Justice could appoint one sitting or retired judge from each of the four counties to serve on a four-judge, district-wide appellate division. Technically, since this proposal does not anticipate formally creating a new appellate court with new judicial positions, the Chief Justice would have to appoint the same four judges to the appellate division in each of the four counties. The practical result, however, is to create the equivalent of a district-wide appellate division.

As discussed further below, it is likely that the specific structure of district-wide appellate divisions will have to be tailored to each Court of Appeal district in light of geographic and workload differences between the districts. In addition, the full-time appellate division in Los Angeles should perhaps be retained without change as a single-county appellate division. However, it appears that every district is amenable to a structure that roughly approximates a district-wide appellate division.

2. Advantages to District-Wide Appellate Divisions

There are manifold advantages to having district-wide appellate divisions. First, aggregating appellate divisions within a Court of Appeal district will help equalize caseloads between appellate divisions. At present, many appellate divisions handle only a dozen or fewer cases annually, while many others handle hundreds of cases a year. This discrepancy between appellate division workloads can be substantially eliminated by aggregating appellate divisions within existing appellate districts since there is a high correlation (85%) between the number of appeals with records filed in the Court of Appeal for each district with the number of appeals taken to all of the appellate divisions within each district. Although caseloads are not perfectly equalized at the Court of Appeal level, there is clearly a better matching of resources to cases at the Court of Appeal level than at the current appellate division level.

Second, a restructuring along district lines would significantly ameliorate the problem of peer review since it would be easier to make appointments to a district-wide appellate division that reduced or entirely eliminated the practice of having judges from the same county reviewing each other's cases. In addition, cross-assigning judges from different counties to sit on the appellate division will help ensure that the appellate division's decisions are informed by the views of judges from diverse counties. Although the residents of a county have a legitimate interest in having local trial courts that are closely connected to local communities, the appellate functions of error correction and legal interpretation are best performed by an appellate court which has a measure of independence from purely local concerns. A district-wide appellate division will also reduce the problem of disqualifications by appellate division judges or conflicts with

research attorneys because of previous involvement in a case, a problem that is especially acute in smaller counties. As explained in chapter 2, the number of disqualifying conflicts is essentially dependent upon the number of trial judges whose cases are reviewed by a single appellate division. In counties with 9 or fewer judges, the likelihood of a conflict is significant. However, in a district-wide appellate division, the number of trial judges whose cases are reviewed is equal to the total number of trial judges within the district. The *smallest* number of trial judges within a district is found in the Sixth District Court of Appeal, where there are 109 superior court judges in the four counties within the district. The likelihood of disqualifying conflicts given this large number of trial judges is very small (particularly since the appellate division judges may be working half- or full-time on appellate division matters during the term of their appointment).

Third, there will be significant economies of scale with a district-wide appellate division since the division is more likely to operate on a full-time or half-time basis whereas most of the existing appellate divisions operate only intermittently. A full-time or half-time appellate division is more likely to develop efficient, cost-savings processes because the work of the division will be brought into greater focus. Under the current system, most judges assigned to an appellate division spend less than 5 hours per month on appellate division business. With such a small commitment of time to the appellate division, there is little incentive or opportunity for either judges or staff to become experts in appellate work.

Fourth, the quality of review should significantly improve because full-time or half-time appointees will develop greater expertise in handling appellate division matters. In addition, creating full-time or half-time appellate divisions will make it easier to justify assigning full-time staff and research attorney support. With fewer judges handling all of the appeals, and with additional staff and research attorney support, we can expect decisions to be more consistent and professional, and we can legitimately demand all decisions to be supported by a written opinion.

3. Complicating Factors

There are some significant differences between districts that will complicate the adoption of district-wide appellate divisions. First, Court of Appeal districts have widely varying numbers of counties within their jurisdiction. The Second and Sixth districts encompass only 4 counties, the Fourth has 6 counties, the Fifth has 9 counties, the First has 12 counties, and the Third has 23 counties. One of the advantages of having an appellate division in every county is the close proximity for both the parties, counsel and the appellate division to the trial court. The Task Force was sensitive to the impact that changing to district-wide appellate divisions would have on the parties and the community. Requiring parties to travel or appear by teleconference is not ideal. Indeed, all things being equal, cases would be heard locally; there is value of geographic

convenience to the parties and counsel that should be recognized and, if possible, accommodated. Geographic convenience could be maintained in a district-wide appellate division if the judges were to employ teleconferencing or video-conferencing technologies, or if the appellate division were to "ride circuit" to each of the counties. Riding circuit would appear to be a possible solution in the Second, Sixth, and Fourth districts, but riding circuit becomes increasingly problematic as the number of counties, and the frequency of sessions for each county, increases. One approach to addressing this problem is to provide for "sub-divisions" within one or more districts. For example, one can readily imagine a northern and southern sub-division for the appellate division within the Third District. Moreover, as noted above, appellate divisions can take full advantage of teleconferencing and video-conferencing technologies to reduce the necessity for travel between counties.

Second, Court of Appeal districts face very different geographic and seasonal conditions. The Third District is the largest and includes many mountainous regions which can become nearly impassable during winter months. The First District stretches along the coastline such that the greatest distance between county seats is approximately 400 miles and includes mountainous driving. The Fourth District is also fairly large, with approximately 350 miles between county seats, and includes mountains. By contrast, the Second, Fifth and Sixth Districts are more compact and travel between counties is somewhat easier.

Third, because of caseload differences, some of the district-wide appellate divisions will be suitable for full-time status, while others will have a caseload that justifies only part-time status. Based on the experience in Los Angeles, it appears that a full-time appellate division can handle about 250 cases per judge per year. It appears that full-time appellate divisions would be necessary in the First, Second, and Fourth appellate divisions, while half-time appellate divisions may be suitable for the Third, Fifth and Sixth appellate divisions. The actual numbers will, of course, have to be determined by the Chief Justice with the assistance of the Administrative Office of the Courts.

These complicating factors – the number of counties within districts, travel distances between counties, seasonal variations that complicate travel, and caseload differences – suggest the need for special tailoring of the appellate division for each district. One size will definitely not fit all districts.

4. Tailoring for Each District

The Task Force identified six different models for possible tailoring of a district-wide appellate division as follows:

1. Appointment of four appellate division judges for the whole district who sit in one location.

2. Appointment of four appellate division judges for the whole district who "ride the circuit" to each county seat.

3. Appointment of four appellate division judges for each of several subdivisions of the district, either riding circuit or in one location.

4. Appointment of four appellate division judges for two or more districts, or parts of districts, to ensure a full-time workload.

5. Appointment of more than four appellate division judges for the whole district.

6. Appointment of four appellate division judges for each county (with overlap), but judges appointed for one county could sit on a panel in any county in the district through cross-assignments.

Each of these models has strengths and weaknesses in responding to differing geographic distances within a district, workload variations, the different number of counties within a district, variations in legal culture from one county to another, and the impact of a judge's absence from his or her home county. The memorandum in Appendix C reviews these considerations in detail (and also discusses certain technical legal issues such as whether the statutes or rules dealing with court sessions authorize an appellate division to sit outside of its county). That memorandum also identifies implementation issues that must be resolved. Notably, there is an issue as to whether the appellate division of a superior court must hold sessions in its county. That issue has not yet been fully researched or resolved. The Task Force recognized that, as noted in the memorandum in Appendix C, resolution of this issue may require statutory amendments. The decision of how best to structure the appellate divisions should be made by the Chief Justice (since the district-wide structure is a consequence of the Chief's power to appoint judges to the appellate division) with input from with the superior court presiding judges and the administrative presiding justices of each of the six appellate districts in light of updated caseload statistics.

The importance of collecting more recent and complete caseload statistics is worth emphasizing, particularly in light of the likely increase in work resulting from giving the appellate division writ jurisdiction and the likely decrease in work resulting from the statutory change which allows a single appellate division judge to handle traffic infraction appeals. However, in order to show how differences between districts might affect the structure of the appellate divisions, the Task Force offers the following observations based upon the unverified results from the Task Force's 1999 survey.

a. Appellate Division in the First Appellate District

Based on the survey, it appears that the aggregate caseload for appellate divisions in the first appellate district includes 1020 non-traffic appeals and 180 traffic appeals. This suggests that an appellate division of four full-time judges would be appropriate.

The first appellate district encompasses 12 counties. The greatest distance between county seats is approximately 400 miles and travel is along the coastline including mountainous areas. However, most of the cases are concentrated in a relatively smaller area near the San Francisco Bay. Less than 10 percent of the cases (about 83 per year) are in the northern counties of Lake, Mendocino, Humboldt, and Del Norte. Thus, as a practical matter, the more remote counties could be covered with a relatively small number of trips during the year or through the use of teleconferencing or video-conferencing.

In light of the concentration of cases in the bay area, the most logical approach is to select three of the judges for the appellate division in the first appellate district from the eight extended bay-area counties (i.e., Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Solano and Sonoma) and to select the fourth member from the four more remote counties (i.e., Lake, Mendocino, Humboldt and Del Norte). This is likely to minimize the travel time spent by judges on the appellate division.

b. Appellate Division in the Second Appellate District

Based on the survey, it appears that the aggregate caseload for appellate divisions in the second appellate district is approximately 875 non-traffic appeals and 375 traffic appeals. This suggests that an appellate division of five full-time judges would be appropriate.

The second appellate district encompasses only 4 counties, and the greatest distance between county seats is approximately 200 miles with freeways connecting the counties. Eighty percent of the cases arise in Los Angeles, where there already is a full-time appellate division of four judges. Assuming that the existing four-judge appellate division panel in Los Angeles could not handle the entire caseload for the district (an assumption that needs to be evaluated in light of more recent workload data), one approach would be to add a fifth appellate division judge from one of the other three counties (i.e., San Luis Obispo, Santa Barbara, and Ventura) and to reserve the four other positions for Los Angeles judges. This allocation will ensure some representation on the appellate division from all counties within the district while minimizing the travel time spent by judges on the appellate division as they ride circuit to each of the district's 4 counties.

However, the Task Force believes an alternative that preserves the Los Angeles Appellate Division is preferable. In particular, the appellate division for the second appellate district could be divided into two panels of judges. The Los Angeles panel would consist of three or four full-time judges, and the second panel would consist of three or four half-time judges (one or two from Ventura, and one from San Luis Obispo and Santa Barbara). This approach may have several advantages. First, it leaves undisturbed what appears to be a well-functioning appellate division in Los Angeles. In light of the size of the Los Angeles Superior Court, the full-time status of its existing appellate division and the separation of facilities, there is much less of a problem with peer review in Los Angeles than in any other county of the State. Second, creating two panels avoids the difficulty of travel into and out of Los Angeles. Third, this approach can be implemented without amending C.C.P. § 77(a), which currently sets a cap of four judges on the size of an appellate division.

c. Appellate Division in the Third Appellate District

Based on the survey, it appears that the aggregate caseload for appellate divisions in the third appellate district is approximately 250 non-traffic appeals and 100 traffic appeals. This suggests that an appellate division of three half-time judges would be sufficient. However, in order to ensure the availability of a judge in light of possible disqualifications or conflicts, it would be wise to appoint four half-time judges to the appellate division.

The third appellate district encompasses 23 counties. The greatest distance between county seats is approximately 440 miles and travel routes include many mountainous roads and snow. About 80 percent of the cases are in counties with county seats in the north-south corridor from Sacramento to Redding. The total number of counties combined with the great distances suggests that dividing the appellate division into two (e.g., southern and northern) would most efficiently match judicial resources to the caseloads and geographic conditions.

d. Appellate Division in the Fourth Appellate District

Based on the survey, it appears that the aggregate caseload for appellate divisions in the fourth appellate district is approximately 1,050 non-traffic appeals and 450 traffic appeals. This suggests that an appellate division of four full-time judges would be appropriate. The fourth appellate district encompasses 6 counties. The greatest distance between county seats is approximately 350 miles. The distance between counties may make riding circuit difficult, particularly since two-thirds of the cases arise in the southern-most counties of San Diego and Imperial (both of which are located within Division One of the Fourth District Court of Appeal). This appellate division may need to explore, among other things, routine use of teleconferencing and video-conferencing.

e. Appellate Division in the Fifth Appellate District

Based on the survey, it appears that the aggregate caseload for appellate divisions in the fifth appellate district is approximately 190 non-traffic appeals and 35 traffic appeals. This suggests that an appellate division of four quarter-time judges would be appropriate.

The fifth appellate district encompasses 9 counties, and the greatest distance between county seats is approximately 230 miles. The four appellate division judges should be appointed from four different counties in the district, and some consideration should be given to ensuring that the counties are representative of the different parts of the district.

f. Appellate Division in the Sixth Appellate District

Based on the survey, it appears that the aggregate caseload for appellate divisions in the sixth appellate district is approximately 120 non-traffic appeals and 80 traffic appeals. This suggests that an appellate division of four quarter-time judges would be appropriate.

The sixth appellate district encompasses only 4 counties, and the greatest distance between county seats is only 80 miles. About half of the cases arise in Santa Clara county, with the remainder evenly split between Monterey, San Benito and Santa Cruz. In these circumstances, the most logical approach is to appoint one judge from each county to serve on the appellate division on a quarter-time basis.

B. Selection and Training of Appellate Division Judges

The process of selecting judges to serve on a district-wide appellate division will, of necessity, be more elaborate than the process of selecting judges to serve on a single county's appellate division. Appointments to a district-wide appellate division will have an impact upon litigants, counsel and courts throughout a district, and since only a small number of judges will be appointed in each district to handle the workload for the entire district, it is all the more important to select the best possible candidates.

The Chief Justice is ultimately responsible for making appointments to the appellate division "to promote the independence of the appellate division." Cal. Const., Art. VI, § 4. According to Rule 100.5(a) of the California Rules of Court, in making these appointments, the Chief Justice "will consider the goal of promoting the independence and the quality of the appellate division." Rule 100.5(b) lists the following non-exclusive list of factors which may be considered in making appointments: "(1) length of service as a judge; (2) reputation within the judicial community; (3) degree of

separateness of the appellate division work from the judge's regular assignments; and (4) any recommendation of the presiding judge."

As noted in Chapter 2, there is substantial variation in the manner in which superior courts select nominees to serve on the appellate division. While selection by the presiding judge is the predominate method used, other approaches include selection by rotating assignment, seniority and a vote of the court.

The Appellate Division Task Force does not believe a significant change in the nomination process is necessary. Of the methods currently employed, nomination by the presiding judge in light of the first three factors set forth in Rule 100.5(b) best promotes independence and quality. The presiding judge already has the general responsibility for making assignments of judges throughout the court and is thus in a good position to evaluate the skills and temperament of judges on the court. The other methods employed for selecting nominees – rotation, seniority and a vote by the court – are not as likely to promote "quality" and "independence." Although rotation and seniority avoid any appearance of a conflict or favoritism in making the nomination, the essentially arbitrary nature of this nomination process excludes any consideration of the quality and temperament of the nominee. A nomination by vote of the entire court creates an appearance of dependence that is incompatible with the independence of the appellate division.

In addition to the nominations from presiding judges of the superior courts within a district, we recommend that the Chief Justice receive a report from the administrative presiding justice of each district reflecting the Court of Appeal's input concerning the superior court nominees within the district.

To promote quality on the appellate division bench, newly-appointed appellate division judges should be required to attend an introductory program prepared by the Center for Judicial Education and Research ("CJER"). The curriculum for this program should encompass rules and procedures applicable to the appellate division, principles of appellate opinion writing, standards of appellate review, and substantive law in those areas likely to be before the appellate division. CJER should consider preparing a manual or deskbook for appellate division judges. Finally, all appellate division judges should be invited to attend CJER's regular conferences for appellate judges.

C. Appellate Division Staffing and Training for Staff

The survey results reported in chapter 2 indicate that in almost half of the counties in the state, the appellate division functions without the sort of clerical, court clerk and research attorney support that the Task Force believes is necessary consistently and cost-effectively to perform appellate functions. In particular, appellate divisions in 27 counties lack staff attorney support, and the division has no independent non-attorney

staff support in 21 counties. We can reasonably expect significant improvement in the quality of appellate division work product only if the judges assigned to the appellate division are given appropriate research attorney and staff support.

One of the advantages of reorganizing appellate divisions along district lines is the practicality of providing dedicated staff support to the appellate division. Under current practice, in the vast majority of counties which have only a handful of appellate division cases during the year, it would be inappropriate to assign significant, exclusive staff time to appellate division operations. However, with a district-wide appellate division, full-time staff support becomes cost-effective, and the Task Force is convinced that the professionalism of the appellate division can be improved by the use of full-time staff who are given appropriate training.

A number of practical issues would need to be resolved to create full-time staff support. For example, how many research attorneys should be assigned? Which court or courts within the district should provide the staff? Should the Court of Appeal for the district provide the staff support? How should the expenses for the staff be allocated among courts within the county? The answer to these and other questions may vary depending upon the characteristics of the district. However, the Task Force recommends that serious consideration be given to having the Court of Appeal for each district supply the necessary staff support for the appellate division of that district. This approach will best ensure the continuity, independence and professionalism of appellate division staffing.

D. Facilities

As noted above, Los Angeles has the only "purpose built" courtroom for its appellate division. The Appellate Division Task Force is not in a position to recommend specific modifications in superior courts to accommodate the appellate division. However, the Task Force is concerned that insufficient attention has been paid to the facilities needs of the appellate division (most importantly, the need for a three-judge bench in non-traffic infraction appeals), and the Task Force hopes that greater attention will be paid to this issue as new courthouses and courtrooms are constructed.

Since facilities within the trial court may not be suitable for appellate division appeals requiring a three-judge panel, the Task Force recommends that, when practical, the appellate division be permitted to use Court of Appeal courtrooms for oral argument (with the exception that traffic infraction appeals, which should be heard by a single judge pursuant to recent amendments to C.C.P. § 77, should be conducted in the trial court's facilities for the convenience of the appellant). Alternatively, appellate divisions may consider using other facilities within the county. Recently, for example, the Third District Court of Appeal has begun to "ride circuit" to some of its more remote counties.

The court makes special arrangements for facilities when riding circuit, oftentimes finding space that is *not* within the superior court of the county.

E. Workload Characteristics

1. Traffic Infraction Appeals

As noted in chapter 2, pursuant to a 1999 amendment, traffic infraction appeals may now be heard by a single judge from the appellate division instead of by all three judges of the division. C.C.P. § 77(j). Although the legislative history contains no explanation for the change (since the language appeared in an omnibus bill which was described in committee reports as containing only technical and minor amendments), it is likely that the primary basis for the change was the reality that appeals from traffic infraction convictions are almost always limited to factual contentions and present simple, routine issues for appellate resolution. In light of these characteristics, the Legislature must have concluded that a three-judge panel was unnecessary. The Task Force agrees that providing three judges to hear traffic infraction appeals is an unnecessary commitment of judicial resources to that type of appeal.

One of the most significant problems with traffic appeals is the absence of a record. Often there is no court reporter transcribing the trials in traffic infractions and the preparation of settled statements on appeal is often a time consuming and difficult process for the litigants and the court. With that in mind, the Task Force recommends the following proposal which would avoid the necessity for having a record in many traffic appeals and would expedite consideration of these appeals: Initially, an appeal from a traffic infraction conviction would be fully presented in the opening brief of the appellant. Based solely on that brief, the reviewing judge would decide if a reversible error has been presented. If not, the appeal could be denied with a brief statement of reasons. If a reversible error has been presented, only then would a record be prepared, and the case would then proceed in the usual manner. The Task Force believes that many traffic infraction appeals could properly be denied under this system**;** not requiring preparation of the appellate records would simplify the appellate process and save litigants and the courts considerable time preparing settled statements on appeal.

2. Settled Statement Problem

The Task Force makes no recommendation regarding the problem of using settled statements in lieu of a reporter's transcript. Although the settled statement process is often unsatisfactory, short of ensuring that all trial proceedings are reported by a court reporter, there does not seem to be a practical alternative to the settled statement process. A recommendation regarding the use of reporters in the trial courts is beyond the scope of the Task Force's charge. At a minimum, however, under the rules of court as they are

proposed to be amended below, the use of settled statements should be governed by Rule 7 and not by the somewhat looser standards which currently appear in Rules 127 and 187.

F. Work Product

As noted above, while appellate divisions in most counties make decisions supported by written opinions in some cases, a number of counties do not issue written opinions. Moreover, there are no consistent guidelines regarding the content of appellate division opinions.

The Task Force recommends that written opinions be required for all appellate division decisions resolving causes on the merits (with opinions either in the form of a separate document or a minute order stating reasons for the decision). A written opinion requirement promotes better decision-making by appellate courts and increases public confidence in appellate decisions. The Task Force recommends that the standards applicable to memorandum opinions be applied to appellate division opinions. *See Report of the Appellate Process Task Force*, pp. 44-49 (August 2000); *Lewis v. Superior Court* (1999) 19 Cal.4th 1232.

Although the Task Force recognizes that this would increase workloads of the appellate divisions, that increase will be outweighed by the increased quality and understanding of the court's deliberative process. Moreover, the appellate divisions will be appropriately staffed, including the assignment of enough judges to shoulder the burden. Decisions in many appellate division matters will not require particularly lengthy opinions, and the Task Force is not recommending that any greater percentage of appellate division opinions be published (although the Task Force expects that moving in the direction of district-wide appellate divisions should reduce some of the variation among counties in the number of appellate division opinions that are published).

G. Rules of Court

As noted above, there are two sets of appellate rules, one set applicable to the Courts of Appeal and the Supreme Court, and the other set applicable to the appellate division. Historically, there were very good reasons for maintaining two distinct sets of rules for appeals. When Bernard E. Witkin initially formulated the appellate department rules in 1947, felony cases tried in superior courts bore absolutely no resemblance to misdemeanor cases, many of which were tried in an isolated justice court by a judge who was not a lawyer, with no defense counsel and no reporter. Similar differences in trials existed on the civil side. Rules of appeal that were appropriate for superior court trials were inappropriate for municipal court or justice court trials.

However, in light of the unification of the trial courts, the historical procedural differences between felony and misdemeanor or infraction trials, and between general civil and limited civil cases, have been largely obliterated. In today's unified courts, trials of felonies and misdemeanors look virtually the same in structure, are heard by the same judges and share most of the same features and characteristics. The most significant difference is the range of punishment that may be imposed, and that difference does not suggest a need for different rules of appellate procedure. There remain differences in procedure between general and limited civil cases, but most of those differences relate to the scope of discovery, and those differences do not support maintaining two sets of appellate rules.

The Task Force appointed a subcommittee to review in detail the Rules of Court applicable to the appellate divisions, and the Task Force agrees with the subcommittee's recommendation that the most logical and straightforward action is to incorporate the rules for the appellate division into the appellate rules for the Courts of Appeal and Supreme Court. While there are a few rules that require amendments to account for real differences between the courts, most of the rules applicable to the Courts of Appeal and Supreme Court can be applied without modification to the appellate divisions. In addition to harmonization of rules applicable to appeals, making the existing Court of Appeal and Supreme Court rules generally applicable to the appellate divisions will give the appellate divisions rules for handling writs (rules that presently do not exist at all).

Appendix D contains recommended amendments to the California Rules of Court which merge the appellate division rules into the rules applicable to the Courts of Appeal and the Supreme Court. The Task Force is aware that other Judicial Council committees have primary responsibility for updating the appellate rules of court, and the Task Force recommends that Appendix D be forwarded to the appropriate committee or committees for consideration.

Chapter 4.
Concurring and Dissenting Views

The following minority report regarding further appellate review of decisions by an appellate division has been submitted by Mr. Dennis A. Fischer. Mr. Edward J. Horowitz concurs in part two of the minority report.

PART ONE

I join fully in the recommendations my colleagues on the task force have made to model the structure and operation of the statewide appellate divisions of the superior court after the Court of Appeal. My joinder is with one substantial reservation, namely, the premise that in the wake of state trial court unification, some appeals from the now-unified superior court should go to the Court of Appeal while others should go to a separate appellate division of the superior court. My first choice would be to have a single statewide court of appeal for all appeals from the superior courts, no matter what the nature of the action or underlying proceeding may be. I recognize that for now, the question why all cases cannot go directly to the court of appeal may have been preempted by Proposition 220's amendments to sections 10 and 11 of article VI of the California Constitution, which for the first time introduced the language "appellate division of the superior court" to the state Constitution and spelled out its jurisdiction. I am not certain what would have to occur to "undo" this constitutional amendment, but I am confident that if there is no necessity to have one state trial court instead of two, there is none for retaining two separate appellate courts. It is certainly true that many limited jurisdiction civil appeals and misdemeanor criminal appeals are less complex than normal civil appeals and felony criminal appeals, but one size does not fit all and there ought to be ways to "fine tune" appeals that do not justify fuller dress treatment; surely the labels are not what ultimately define what kind of appellate review is most appropriate. Moreover, while our proposal will do much to reduce the concerns about peer review that may well be the single greatest problem created by unification, it will not eliminate the perceptions that a judge of the appellate division still is a superior court judge who is sitting in judgment on his or her colleagues= appeals. I wager that each and every objection I have heard to having a single appellate court (meaning a statewide Court of Appeal with jurisdiction over all superior court cases) is capable of solution, and that 20 years after the superior court appellate division follows the municipal court into oblivion, others in our shoes will look back and wonder how it could have taken so long to unify the appellate court system.

PART TWO

If one is to accept that state trial court unification does not warrant all appellate review from the superior court to be heard in the court of appeal, I join fully in the recommendations my colleagues on the task force have made to model the structure and operation of the statewide appellate divisions of the superior court after the Court of Appeal. That model not only succeeds in bringing needed uniformity and consistency presently lacking in the arcane and often idiosyncratic provisions of the rules governing the former appellate departments of the superior court (with due allowance for the unique aspects of appellate review at that level), but its approach should go far to allay the concerns about "peer review" that many who responded to our survey highlighted. Nevertheless, my colleagues leave one significant gap: no procedure analogous to the right enjoyed by the losing party in an appeal decided by the Court of Appeal to seek review in the California Supreme Court.

Under rule 62(a) of the California Rules of Court, a decision of the appellate division of the superior court may be reviewed by the Court of Appeal (i.e., the next highest court) only through transfer of a cause that has either been certified to the Court of Appeal by the appellate division or in those rare cases in which the appellate division's decision has been certified for publication. I would rectify this omission by adding to our proposals a procedure for petitioning the Court of Appeal to transfer a cause after decision by the appellate division, just as a party may petition for review in the Supreme Court pursuant to rules 28 and 29 in cases decided by the Court of Appeal.

At the same time that unification of the municipal and superior courts was achieved through the enactment in 1998 of Proposition 220, the appellate divisions of the superior court were given constitutional status. (See Cal. Const., art. VI, § 10.) But constitutionalizing the appellate divisions did not cure all problems. The fact remains that judges of the superior court assigned to the appellate division are reviewing the actions of another superior court judge — i.e., a "peer"; unlike the relative insulation that exists between Court of Appeal justices and superior court judges whose rulings they review, judges of the appellate division are appointed with the approval of the presiding judge of the superior court and in all courts but one sit for only limited periods of time while attending primarily to superior court trial duties. Even though I do not doubt the ability of superior court judges to be fair and impartial when reviewing their peers' judgments during that assignment, appellate division judges are vulnerable to subjective pressures and tensions that may affect appellate judging. More importantly, the potential for such conflict has been enough to raise concerns in the task force about the <u>appearance</u> of impartiality, and that perception has played a paramount role in our recommendations.

Unfortunately, that concern has not moved my colleagues to take the last step and abolish the existing barrier to higher court appellate review that the certification/transfer

procedures of existing rules 62 and 63 sanction. Under these rules the "gatekeeper" is almost always the appellate division itself, i.e., the appellate court whose decision a party would like to have reviewed by a higher court — not the higher court itself, as does the Supreme Court in appeals decided by the Court of Appeal. Even if the determination of an appellate division to deny certification is entirely justifiable, such denials routinely are without explanation and there is no mechanism to ensure that the denial is not motivated in part by reasons that may be inappropriate, at least as they may be perceived by the public in an unpopular case of great local notoriety where suspicions sometimes abound. Why leave in place an antiquated restriction on review that can only result in unneeded criticism of the courts based on suspicions about lack of impartiality, the very core issue on which the courts are most vulnerable?

There is another compelling reason for bringing into parity the review mechanism for cases decided by the appellate divisions with the present procedures available in cases decided by the Court of Appeal. One is the trend toward greater difficulty and complexity of issues in matters that are treated as limited civil cases or prosecuted as misdemeanors, with greater stakes to the parties. Many are indistinguishable from cases being brought in the superior court that would have been treated differently if appealable to the Court of Appeal, but which for a number of reasons become appeals to the appellate division because they are not filed or heard as unlimited civil cases, or as felonies in lieu of misdemeanors. Some of these issues are likely to be identical to those the Court of Appeal now decides. Why should there be a barrier to the Court of Appeal's transferring the cause to consider important questions of law or to secure uniformity of decision, simply because the appellate division is its own gatekeeper as to further review, when in virtually identical circumstances the same issue could be reviewed by the Supreme Court after decision by the Court of Appeal because the latter may not close the gate to higher court review?

The primary concern raised by members of the task force is that my proposal would add to the Court of Appeal's workload. The California Supreme Court reviews 150 or more petitions for review every week, we are told, and a similar procedure that would allow review of every decision from the appellate division by a petition for transfer to the Court of Appeal would similarly inundate those courts and create unnecessary workload. I believe the problem is vastly overstated. That is evident merely from considering the enormous differences between felony criminal appeals with their serious charges and lengthy sentences (the result of the Three Strikes Law and increases generally throughout the felony sentencing scheme that require many more indeterminate life sentences than was the case 10 to 20 years ago), compared with misdemeanor cases involving finite and necessarily limited length of incarceration resulting from county jail sentences and probation that continue to characterize misdemeanor cases. Moreover while most felony appeals in which the defendant received a life sentence now represent waystations to federal habeas corpus review, very few misdemeanors are pursued beyond the state courts. In short, the number of cases in which petitions for transfer would be

filed necessarily would be small. This is borne out by our survey that revealed mostly modest numbers of cases handled by all but a few of the state's appellate divisions, and even in those counties there is no reason to believe further review would be sought routinely merely because the present barrier to petitioning was eliminated.

Ultimately the criticism is unwarranted simply because further review will not be sought in most cases. In many, the parties are proceeding *pro se* and no important questions are presented in any event. Indeed, a good many of the appeals are in infraction cases where the issues are factual, brought up on the face of the citation, and may be disposed of readily; under recent legislation, a single judge of the appellate division may decide them. Although most such litigants are likely to be satisfied by the opportunity afforded to appeal to the appellate division, and compliance with the procedures for further review are likely to frustrate all but a handful of those who are still dissatisfied, surely the Court of Appeal will not have to devote substantial resources to ruling on petitions for transfer of the relatively few that surmount these obstacles. Should my prediction of a modest number of petitions prove understated, however, that might actually reinforce my point and serve as further justification for such a procedure. In any event, speculation about that possibility should not be the basis for refusing to experiment, especially when shutting that door entirely would preclude review in some cases that do justify it.

In sum, under the present rules some cases adjudged in the now unified superior court are subject to discretionary review upon petition by the losing party, whereas others are not. That disparity is flawed, and a good argument can be made that it is unconstitutional. The reviewing court (the appellate division) should not have the final say on whether any higher court (i.e., the Court of Appeal, and thereafter the Supreme Court) may review its decision on appeal. I do not believe a fair argument can be made for insulating any appeal from discretionary review under California law and practice; surely no one would seriously suggest that barrier would be acceptable in cases decided by the Court of Appeal. Accordingly, I propose that we recommend the revision of rule 62(a), by eliminating the phrase "when the superior court certifies," and replace it with language drawn from rules 28(b) and 29(a) that allows a party to seek transfer within 10 days after the decision of the appellate division becomes final. Consideration should perhaps also be given to whether the Court of Appeal may transfer a case to itself "on its own motion" following decision by the appellate division that is certified for publication, a procedure some Courts of Appeal may prefer to retain as an error-correction device despite the losing party's failure to petition for transfer. Since both rules 62 and 63 still contain the obsolete "appellate department" references, and their procedures probably can be more closely tailored to the review procedures in the Supreme Court, my proposed adoption of a "petition for transfer" procedure probably would best be accomplished by rewriting those rules from scratch.

The majority's disagreement with my view that the transfer procedure needs to be overhauled is shortsighted, but in all other respects I wholeheartedly join my colleagues' path-breaking recommendations.

Respectfully submitted,

DENNIS A. FISCHER

EDWARD J. HOROWITZ concurs in part two.

Appendix A.
Survey Instrument

The following survey instrument was distributed by the Task Force to the superior court in each county.

_____

QUESTIONNAIRE FOR APPELLATE DIVISION PRESIDING JUDGES

Please answer all questions on an annual basis, using the most recent 12-month period (calendar or fiscal year) that provides reliable statistics. If exact statistical information is not available, provide estimates and so indicate.

Although most courts are now consolidated, because such consolidation occurred at different times, we nevertheless refer herein to "appeals from municipal courts." This is intended to include appeals to the appellate department or appellate division, regardless of whether such appeals were initiated before or after consolidation.

1. Name of your county _____.

1. If judges from other counties constitute part of your appellate division, please name their count(ies) _____.

1. How are the judges in your court chosen to serve on the appellate division? ☐ Seniority. ☐ Vote of the court. ☐ Presiding Judge decides. ☐ Rotating assignment. ☐ Other:_____.

1. Does your appellate division have staff attorney support? ☐ Yes. ☐ No.
   b. If yes, how many attorneys? _____.
   c. If one (or less than one Full Time Equivalent), please indicate portion of his/her time is devoted to appellate division?_____.

1. Does your appellate division have staff support (other than attorney staff)? ☐ Yes. ☐ No.
   b. If yes, how many Full Time Equivalent staff persons? _____.
   c. If one (or less than one Full Time Equivalent), please indicate portion of his/her time is devoted to appellate division?_____.

6. How often does your appellate division meet? ☐ Once a month. ☐ Twice a month. ☐ Once a week. ☐ More than once a week. ☐ Other:_____.

6. On average, how many hours per month does your appellate division spend in hearing oral argument? ☐ 0-5 hours. ☐ 5-10 hours. ☐ 10-15 hours. ☐ 15-20 hours. ☐ 20-25 hours. ☐ 25-30 hours. ☐ 30-35 hours. ☐ 35-40. ☐ More than 40 hours.

6. On average, how many hours per month does each member of your appellate division spend in connection with his or her appellate duties? ☐ 0-5 hours. ☐ 5-10 hours. ☐ 10-15 hours. ☐ 15-20 hours. ☐ 20-25 hours. ☐ 25-30 hours. ☐ 30-35 hours. ☐ 35-40. ☐ More than 40 hours.

6. During the past 12-month period, how many matters did your appellate division decide? _____.

6. During the same 12-month period, how many matters decided by your appellate division consisted of the following:

   a. appeals from traffic infractions _____.
   b. appeals from infractions other than traffic _____.
   c. appeals from misdemeanor convictions _____.
   d. Appeals from civil cases (not including small claims) _____.
   e. extraordinary writs determined by 3-judge panel _____.
   f. other (please specify) _____.

1. Do you ever receive *Wende* briefs (*People* v. *Wende* (1979) 25 Cal.3d 436) in misdemeanor appeals? ☐ Yes . ☐ No.
   If yes, how many during the past 12-month period? _____.

1. Does your appellate division issue written (but not published) decisions with explanations? ☐ Yes. ☐ No.
   b. If yes, are there any guidelines that determine whether the decision should be written? ☐ Yes. ☐ No.
   c. If yes, how many written (but not published) decisions with explanations has your court issued in the same 12-month period? _____.
   d.
5. How many published opinions did your appellate division issue during the same 12-month period you used to answer prior questions? _____.

13. Does your appellate division issue or post tentative decisions prior to oral argument? ☐ Yes. ☐ No.

13. In the past year has your appellate division transferred or certified any appeals to the Court of Appeal under rules 62 or 63? ☐Yes. ☐ No.
    If yes, how many _____.

13. Are the cases handled by your appellate department usually accompanied by a reporter's transcript? ☐ Yes. ☐ No.

13. If only certain types of cases usually have a reporter's transcript, what types of cases? _____.

13. Do your trial courts generally employ reporters when hearing limited civil (☐ yes or ☐ no) and misdemeanor cases (☐ yes or ☐ no)?

13. Has trial court unification resulted in any positive or negative effects in handling appeals? If so, please specify_____
    _____
    _____

13. Do you think there should be specific CJER training for appellate division judges? ☐ Yes. ☐ No.
    If yes, do you have any suggestions:_____
    _____

13. State any suggestions you have to improve the efficiency, fairness, or perception of fairness pertaining to superior court appellate divisions.
    _____
    _____
    _____
    _____
    _____

13. State any other comments or suggestions concerning the Ad Hoc Task Force on the Superior Court Appellate Divisions.
    _____
    _____
    _____
    _____

PLEASE RETURN THIS SURVEY BY JULY 30, 1999 TO:
Joshua Weinstein
Judicial Council of California
455 Golden Gate Avenue

San Francisco, California 94102
415-865-7688
415-865-7664 (FAX)

_____

The survey was sent out with the following cover letter from the Chair of the Task Force:

_____

July 6, 1999

Hon. _____
Presiding Judge, Appellate Division
County of _____

Dear Judge _____:

Chief Justice Ronald M. George recently appointed a Judicial Council Ad Hoc Task Force on the Superior Court Appellate Divisions and asked me to chair the task force. The task force also consists of three superior court judges who now are or have previously been assigned to appellate departments or divisions--three lawyers with extensive appellate experience and a staff attorney.

It became immediately apparent to us that there is very limited information available on the operations of the appellate divisions, the types of cases handled, and the volume of work assigned. Relatively little is known about the time expended by the judges assigned to these divisions and the adequacy of staffing furnished to them. We have therefore prepared a questionnaire that we hope will provide us with information needed to determine whether we should recommend changes in the present system and the nature of any such changes.

We realize that you may not have exact statistical information available to answer some of the questions. If so, please just provide us with your best estimate and indicate after your answer "est."

I would greatly appreciate your either completing the questionnaire or having a member of your staff do so. If it is more convenient for you or a member of your staff to telephone us with the answers to the questionnaire, please do so by calling Mr. Joshua Weinstein, the staff attorney assigned to our task force, at (415) 865-7688. You may also fax your responses to Mr. Weinstein at (415) 865-7664.

I realize this is an imposition on the time of busy judges and staffs. However, we believe that this information is essential to our task and, since we hope to be able to complete our task as soon as possible, request you supply us with the requested information before July 31.

Thank you for your help.

Sincerely,

W. F. Rylaarsdam, Associate Justice
California Court of Appeal

Appendix B.
Survey Results

ANSWERS TO SURVEY
QUESTIONNAIRE FOR APPELLATE DIVISION PRESIDING JUDGES

3. How are the judges in your court chosen to serve on the appellate division?
Seniority…….. 3
Court vote…… 2
P.J. decides…….. 32
Rotating assignment…… 5
Other…… 10

4. Does your appellate division have staff attorney support?
Yes…….. 23
No……... 25

5. Does your appellate division have staff support (other than attorney staff)?
Yes…….. 28
No……... 20

f. How often does your appellate division meet?
Less than once a month…….. 1
Once a month…….. 33
Other – as needed……... 6
– as necessary……... 1
– bi-monthly……. 1
– quarterly…… 1
–once a year…… 1
– less than 1x monthly……. 1
– not regularly…….. 1
– virtually never……... 1
– Oral argument is 2x/mo., but the division is full time & "meets" more often…… L.A.

7. On average, how many hours per month does your appellate division spend in hearing oral argument?

0-5 hours……..	48
5-10 hours……	1

8. On average, how many hours per month does each member of your appellate division spend in connection with his or her appellate duties?

0-5 hours……..	36
5-10 hours……	3
10-15 hours……..	5
15-20 hours……..	3
>40 hours…….	2

Answers to Survey Questions #9 and #10

County	Total of Decisions ***(Quest. 9)***	Traffic Infraction ***(10a)***	Other than Traffic Infraction ***(10b)***	Misdemeanor Convictions ***(10c)***	Civil Cases ***(10d)***	Special Writs By 3-judge Panel ***(10e)***	Other ***(10f)***
Alpine	2	50% (1)		50% (1)			
Alameda	125 est.	40% (50)		40% (50)	20% (25)		
Amador	3	33% (1)		67% (2)			
Butte	29	14% (4)		48% (14)	38% (11)		
Colusa	2			100% (2)			
ConCos	16 est.	31% (5)		38% (6)	19% (3)	13% (2)	
El Dora	25 est.	4% (5)		72% (18)	8% (2)		
Glenn	0						
Humbol	25	4% (1)		60% (15)	28% (7)	8% (2)	
Imperial	22	36% (8)		45% (10)	14% (3)	5% (1)	
Inyo	8			75% (6)	25% (2)		
Kern	101	Info not	available				
Kings	18 est.	66% (12)		28% (5)	6% (1)		
Lassen	7	29% (2)		71% (5)			
L.A.	736 app. 263 writ	38%(275) ---	0% (3) ---	29% (215) ---	33% (243) ---	--- 13% (33)	--- 87%(230
Madera	12	50% (6)		33% (4)	17% (2)		
Marin	374	10% (36)	10%(36)	27% (104)	32% (121)		21%(77)
Maripos	8			75% (6)	25% (2)		
Mendoc	36	10% (4)	10% (4)	70% (24)	10% (4)		

Merced	48 est.	21% (10)		6% (3)	52% (25)	21% (10)	
Modoc	10 est.	20% (2)	20% (2)	20% (2)	20% (2)	20% (2)	
Mono	6 est.				17% (1)		83% (5)
Montery	39	44% (17)	15% (6)	28% (11)	10% (4)	3% (1)	
Napa	13	8% (1)		84% (11)	8% (1)		
Orange	350	35%(125)	4% (15)	29% (100)	29% (100)	3% (10)	
Plumas	5 pendin						
Riversid	75 est.	16% (12)		67% (50)	13% (10)	1% (1)	3%(2)
Sacto	63	25% (16)		42% (26)	27% (17)	6% (4)	
SnBerna	94	43% (40)	5% (5)	29% (27)	21% (20)	2% (2)	
SnDiego	977	25% (242		23% (227)	47% (454)	3% (32)	2% (22)
SnJoaq	36	29% (10)		55% (20)	14% (5)	2% (1)	
SLO	24	21% (5)		62% (15)	13% (3)	4% (1)	
SnMate	43	14% (5)		72% (32)	14% (6)		
Sbarbar	72	24% (17)	6% (4)	33% (24)	11% (8)	18% (13)	8% (6)
Sclara	100 est.	40% (40)		10% (10)	40% (40)	10% (10)	
Scruz	30 est.	50% (15)		50% (15)			

Answers to Survey Questions #9 and #10 (contd.)

County	Total of Decisions ***(Quest. 9)***	Traffic Infraction ***(10a)***	Other than Traffic Infraction ***(10b)***	Misdemeanor Convictions ***(10c)***	Civil Cases ***(10d)***	Special Writs By 3-judge Panel ***(10e)***	Other ***(10f)***
Shasta	65	69% (45)		23% (15)	3% (2)	5% (3)	
Siskiyo	7 est.	29% (2)		43% (3)	14% (1)	14% (1)	
Solano	52 est.	15% (8)		72% (37)	13% (7)		
Sonoma	33 est.	9% (3)	3% (1)	18% (6)	36% (12)	9% (3)	25% (8)
Stanis	16	38% (6)		56% (9)	6% (1)		
Sutter	6	34% (2)		33% (2)	33% (2)		
Tehama	5 est.	17% (1)		66% (4)	17% (1)		
Trinity	5 est.	60% (3)		40% (2)			
Tulare	24			100% (24)			
Ventura	162 est.	44% (71)	20%(32)	17% (28)	11% (18)	8% (13)	
Yolo	20	40% (8)		55% (11)	5% (1)		
Yuba	25	4% (1)		16% (4)	12% (3)	68% (17)	

11. Do you ever receive *Wende* briefs in misdemeanor appeals?

Yes…….. 30
No……... 18
If *yes*, how many?

Wende……Counties	Wende……Counties
0……1	7……2
1……5	10……..1
2……6	12……..1
3……3	20……..1
4……1	30……..1
5……1	no answer given…3
6……2	no stats kept……..1

12. Does your appellate division issue written decisions with explanations?

Yes……. 38
No…….. 9
If yes, are there any guidelines?
Yes……. 6
No…….. 29

If yes, how many written decisions w/explanations in the same 12-month?

Amt. of Appeals	No. of Counties	(County)
0–10	15	
10-20	6	
20-30	2	
30-50	1	
68	1	SBarbara
94	1	SBernardino
133	1	Ventura
196	1	San Diego
736	1	Los Angeles
no answer	2	

13. How many published opinions did your appellate division issue during the same 12-month period you used to answer prior questions?

0……. 42
1……. 4
4-5……. 1
N/A……... 2

14. Does your appellate division issue or post tentative decisions prior to oral argument?

Yes…… 4
No……. 44

15. In the past year, has your appellate division transferred or certified any appeals to the Court of Appeal under rules 62 or 63?

Yes……..… 11
No…….. 33

If yes, how many?

1 transfer……..5
2 transfers……4
4 transfers……1
no response……..1

16. Are the cases handled by your appellate department usually accompanied by a reporter's transcript?

Yes……..… 23
No. ……..… 22

Sometimes……. 2

r. Do your trial courts generally employ reporters when hearing limited civil and misdemeanor cases?

Civil cases
Yes…… 19
No. ……... 26
Sometimes…… 1
Misdemeanor cases
Yes…… 29
No…… 21

Appendix C.
Memorandum Regarding Appellate Divisions by District

In deciding to recommend the formation of appellate divisions within districts, the Task Force had the benefit of the following detailed draft memorandum which reviewed the applicable law and identified relevant considerations that should be taken into account in considering how best to structure a district-wide appellate division.

A. Background: Law governing appellate division

Proposition 220 established an appellate division in each superior court. (Cal. Const., art. VI, § 4.) This is similar to (and essentially replaces) the appellate department formerly established under Code of Civil Procedure section 77.[1] The Chief Justice is to assign judges to the appellate division "for specified terms pursuant to rules, not inconsistent with statute, adopted by the Judicial Council to promote the independence of the appellate division." (Cal. Const., art. VI, § 4.)

The appellate division in each county consists of three judges, or, "when the Chief Justice finds it necessary," four judges. (Code Civ. Proc., § 77(a).) One of the judges assigned to the appellate division is designated as the presiding judge of the appellate division. (*Ibid.*) For the appellate division in each superior court, the Chief Justice may assign "a judge of that court, a judge of the superior court of another county, or a judge retired from the superior court or a court of higher jurisdiction in this state." (*Ibid.*) A municipal court judge may be assigned to the appellate division if the municipal court is participating in a trial court coordination plan approved by the Judicial Council and the municipal court judge has been assigned to the superior court of the county. (Code Civ. Proc., § 77(h).) The judges serve on the appellate division "for the period specified in the order of designation." (Code Civ. Proc., § 77(c).)

The presiding judge "shall convene the appellate division when necessary." (Code Civ. Proc., § 77(d).) No more than three judges of the appellate division may participate in a decision and the concurrence of two judges is required to render a decision in every case. (Code Civ. Proc., § 77(b), (d).) An exception to this is an appeal from conviction of a

[1] "In every county and city and county, there is an appellate department of the superior court consisting of three judges or, when the Chairperson of the Judicial Council finds it necessary, four judges." (Former Code Civ. Proc., § 77(a).)

traffic infraction, which may be heard and decided by one judge of the appellate division. (Code Civ. Proc., § 77(j).)[2]

The jurisdiction of the appellate division may be prescribed by the Legislature except where the Constitution has given appellate jurisdiction to the Supreme Court or Courts of Appeal.[3] (Cal. Const., art. VI, § 11(b).) Appeals and writ petitions (other than habeas corpus) in limited civil cases and misdemeanor or infraction cases are to the appellate division. (Cal. Const., art. VI, § 10; Code Civ. Proc., §§ 904.2, 1068, 1085, 1103; Pen. Code, § 1466.)

2. Policy issues: Advantages of district-wide structure

If the municipal and superior courts in a county have unified, the appellate division reviews appeals and writ petitions in cases that were originally heard by judges on the same court as the judges of the appellate division. This has raised concerns including possible appearance of bias because of peer review, and increased disqualifications because of previous involvement in the same case. District-wide appellate divisions, preferably full-time, have been suggested to address these concerns and to bring certain other advantages.

Reduced conflicts – Many courts have tried to avoid disqualifications because of previous involvement in a case by assigning to the appellate division judges who rarely hear limited civil or misdemeanor or infraction cases. However, such conflicts still occur and create difficulties, especially in smaller counties. Research attorneys likewise may encounter their own previous work in an appeal. In addition, some people may find an appearance of conflict when judges review cases decided by their peers, rather than by a lower court.

A district-wide structure would minimize conflicts by greatly reducing the number of judges who must hear appeals. In some districts the appellate division could be a full-time assignment for judges and/or one or more research attorneys, helping to ensure that

[2] Subdivision (j) was added to this section effective September 7, 1999, Stats. 1999, ch. 853, § 1.5.

[3] The Constitution gives appellate jurisdiction to the Supreme Court in death penalty cases and to the Courts of Appeal in causes of a type that were within their appellate jurisdiction on June 30, 1995. (Cal. Const., art. VI, § 11(a).)

they will not work on a case at the trial level before they encounter it as an appeal or writ petition.

Increased quality of work – At present, the only court with a full-time appellate division is the Superior Court of Los Angeles County. According to our recent survey, the appellate divisions in about half the courts do not have staff attorney support, and many do not have any staff support. About 25 percent of them do not issue written decisions with explanations.

A district-wide structure would likely bring the work of the appellate division into clearer focus and permit additional resources to be dedicated to it. Judges would be able to "specialize" in appellate division work and develop expertise in hearing appeals. Staff support including research attorneys could be available full time. This would help increase both quality and efficiency of the work. Decisions would likely be more consistent and written opinions could be issued more often.

Costs – With a district-wide appellate division, a much smaller number of judges would have to hear appeals. Although the total caseload in the district would not change, efficiency could be increased, as noted in the previous paragraph. On the other hand, if judges "ride circuit" to each county, those savings might be offset by increased travel costs.

2. Practical problems in establishing a district-wide appellate division

A number of factors affect the feasibility and practicality of creating a district-wide appellate division, including workload, geographical distances, and local practices. The impact of these factors varies by district.

Workload – The number of cases heard by the appellate division varies greatly among districts. In some districts, four judges are more than enough to hear all cases coming before appellate divisions in the district; sitting on the appellate division would not even be a full-time job. In others, four judges may not be enough to hear and decide all cases in the district. An optimal workload might be a sufficient number of cases to make the appellate division appointments full-time, with regular staff support.

Extent of travel required – The distances within a district affect the amount of time required for travel from one county to another. Greater distances increase costs and inconvenience if judges ride circuit to each county seat. Additionally, in a district with a large number of counties, the judges must move from one location to another more frequently. Conversely, if the judges sit at one location, the inconvenience and expense for parties and attorneys from distant parts of the district is increased. These travel factors are compounded in some areas by mountain ranges and snow in winter.

Minimizing travel for the judges would generally maximize travel for people using the courts, so some compromise may be needed.

Absence from home county – In a large district with a district-wide structure, some judges would have to spend a large amount of time away from their home counties. This would occur if the court sits full-time in a central location distant from the a judge's home county, or if the judges must be on the road much of the time. In addition to expense and inconvenience, a judge may be disadvantaged in seeking re-election.

Variations in legal culture – If legal cultures differ widely in different parts of the district, some people might resent decisions being made by judges all of whom are from a different area with a different legal culture. Therefore, some regional representation on every appellate division may be desirable.

Frequency of sessions – If appellate division judges ride circuit, scheduling sessions regularly may be a problem in districts with a large number of counties, especially where geographic distances are great. California Rules of Court require the appellate division to hold sessions at least once each month. (Rule 101.) In practice, however, the appellate division would not need to meet in every county every month because many smaller counties have less than one case per month within appellate division jurisdiction. Additionally, only one appellate division judge, rather than a panel of three, is needed to hear appeals from traffic infraction convictions. Another option would be to amend rule 101 to permit less frequent sessions while meeting other legal requirements and policy objectives. The statute requires only that the presiding judge convene the appellate division "when necessary." (Code Civ. Proc., § 77(d).)

Local practices in assignment of judges – Judges are assigned to the appellate division by the Chief Justice. (Cal. Const., art. VI, § 4.) In practice, however, judges are recommended for the assignment by the presiding judges of the superior courts. Counties have various traditions on how to select judges. These include rotation, seniority, vote by the court, and selection by a judge who is voted appellate presiding judge by the other judges. A new system likely would disrupt these practices. The impact of this should also be considered.

Data:

Our recent survey provides data helpful to analyzing these practical issues. The table below shows, by district, the approximate number of cases decided annually by the appellate divisions, the number of counties, and the distance that would have to be traveled across the district. These numbers are used in the discussion of practical issues in each district in Part D.

Table 1

District	Number of cases	Number of cases excluding traffic infractions	Number of counties	Approx. greatest distance between county seats
First	900	700	12	400 miles
Second	1,300	900	4	200 miles
Third	350	250	23	440 miles
Fourth	1,500	1,100	6	350 miles
Fifth	250	200	9	230 miles
Sixth	200	100	4	80 miles

The table gives two numbers for the number of cases. The second column shows the total number of cases, including writ petitions, decided by the appellate divisions; the third column indicates the number out of those that require a panel of three judges.

The number of cases decided by the appellate division in Los Angeles can be used to estimate the workload that a full-time appellate division can handle, because Los Angeles has a full-time appellate division (it is the only county that has one). In our recent survey, Los Angeles reported 999 appellate division cases for one year. Of those, 263 were writ petitions, and 275 were appeals in traffic infractions. The latter numbers may be significant for considering workload because the appellate division's involvement in those kinds of proceedings has changed in recent years. Following the passage of Proposition 220, the appellate division rather than the superior court has jurisdiction in writ petitions in limited civil cases and misdemeanor and infraction cases. Thus, the appellate division's caseload increased as of June 3, 1998. Conversely, the workload decreased somewhat as of September 7, 1999, the effective date of an amendment allowing one judge, rather than a panel of three, to hear an appeal of a traffic infraction conviction.

The structure of the court of appeal may be helpful for comparison:

Table 2

District	Number of justices	Number of divisions	Locations
First	19	5	San Francisco
Second	28	7	Los Angeles (Los Angeles County)
			Ventura (Ventura, Santa Barbara, and San Luis Obispo Counties)
Third	10	1	Sacramento
Fourth	21	3	San Diego (San Diego and Imperial Counties)
			Riverside (Riverside, San Bernardino, and Inyo Counties)
			Santa Ana (Orange County)
Fifth	9	1	Fresno
Sixth	6	1	San Jose

2. Possible models for a district-wide structure

Different models may be suitable for different districts. There is no need for all districts to use the same model, but keeping similarities where possible would be helpful for statewide consistency.

a. Four judges for whole district, "riding the circuit" to each county seat.

a. Four judges for whole district, sitting in one location.

a. Four judges for each of several subdivisions of district, either riding circuit or in one location.

a. Four judges for two or more districts, or parts of districts, to ensure a full-time workload.

a. Appellate division of more than four judges for whole district.

a. Four judges appointed for the appellate division in each county (with overlap), but judges appointed for one county could sit a on panel in any county in the district.

The issues in using the proposed models in each district are discussed below, using the data in Table 1.

a. Same four judges for whole district, "riding circuit"

Legally, nothing prevents any county in a district from having the same judges on its appellate division as another county in the district. The same four judges could be appointed to the appellate division for every county in the district. However, this might not be feasible for all districts because of geographic distances, workload, and number of counties.

Geographic distances – Distances may not pose a problem in the second and sixth districts, which each have only four counties and maximum travel distances of 200 miles or less. The fifth district covers a larger area, but the distance from one end of the district to the other is moderate (about 250 miles), and most of the land is level with travel likely to be fast. The first, third, and fourth districts would require travel over longer distances, and they include mountainous areas. The third district covers the largest area, and much of it is mountainous and subject to winter snows.

Workload – In considering caseload for a district-wide appellate division, the full numbers of appellate division cases have been counted, including the traffic infraction appeals. If the judges travel around the district, each such appeal must wait until the appellate division comes to that county. Including traffic infraction appeals, a full caseload (on the basis of the caseload in Los Angeles) is about 1,000 cases per year.

A district-wide appellate division could handle the workload in the fifth, sixth, third, and perhaps first districts. In the sixth district, sitting on a district-wide appellate division would not be a full-time assignment. The same would be true in the fifth district. Where workload is not sufficient for a full-time four-judge appellate division, three judges could hear most of the cases, with a fourth judge available when needed, for example, because of disqualification. Alternatively, perhaps districts might share an appellate division. For example, the fifth and sixth districts might be able to share a more nearly full-time appellate division, given the small workloads and moderate geographical distances.

In the third district the workload is light (350 cases), and might compensate for the travel difficulties to make a single district-wide appellate division possible. The number of appellate division cases in the first district (900) is close to a full workload. The factors of geography and the relatively large number of counties (12), present practical problems for a single district-wide appellate division in the first district. On the other hand, most of the cases are in a relatively small area near the San Francisco Bay. Less than 10 percent (about 83 cases per year) are in Lake, Mendocino, Humboldt, or Del Norte counties.

The second and fourth districts each have too many cases for one district-wide appellate division. This problem might be addressed by subdividing the districts, discussed further below in part 3.

Number of counties – If the judges ride circuit to hear cases in each county, the number of counties is significant because it affects the amount of travel time and/or the frequency of sessions in each county. Sessions of the appellate division are to be held at least once per month. (Rule 101.) In the sixth district, with four counties, the appellate division could easily meet once per month in each county. The second and fourth districts have only four and six counties, respectively, but as noted above, the workload in each of those districts is too great for a single district-wide appellate division.

Riding the circuit in the fifth district, with nine counties, would require traveling to no more than two different counties per week. This might be feasible because the distances are not long and the terrain generally does not impede travel. However, it could be inefficient in terms of both time and money because on many occasions there would be only one case to hear in each county.

In the first district, with 12 counties, travel would be more extensive. However, most of the cases are in counties covering a small geographic area around the San Francisco Bay. One trip per month would be required to hear the cases in Lake, Mendocino, Humboldt, and Del Norte counties (averaging a total of seven cases per month).

The third district has as many counties as there are workdays in the month. In practice, many counties would not need a session each month because they have only a handful of cases per year. Our survey indicated that about half the counties have seven or fewer cases per year. About 80 percent of the cases are in counties with county seats in the north-south corridor from Sacramento to Redding. However, stops in 10–15 different counties would likely be required every month. The number of cases in each county visited would generally be one to five, so this would likely be an inefficient practice.

Rule 101 might be amended to permit longer periods between appellate division sessions, perhaps one every two months, or perhaps quarterly. Other time limits need to be considered before such a change is made, for example, a time within which certain appeals are required to be heard. Additionally, the need to have certain kinds of matters handled quickly, such as a decision on a writ petition, needs to be considered.

Absence from home county – The factor of absence from the judge's home county would affect judges in different counties and districts differently. In the sixth district it would be unlikely to have much impact because distances are small. In the fifth district, with only nine counties and 200 cases (excluding traffic infractions) per year, the appellate division judges could probably limit their travel time. However, if the same judges

served on the appellate division for the fifth and sixth districts (making it about a half-time job), the judges might spend a week or more per month on the road.

In the first district, the impact on judges is uneven. Judges based in the Bay area counties might be able to stay close to home most of the time even though they worked full time on the appellate division and traveled to all the counties. Judges from the northern counties, however, would have to spend much of their time away from home in the Bay area. In the third district, the judges might need to spend about half their time on the road. They would find it particularly difficult to maintain a presence in their home county.

Variations in legal culture – Differences in legal culture are difficult to measure, but it might be assumed that significant differences would be found between urban and rural areas, and areas that are a great distance apart. The sixth district, again, would have the least difficulty. With only four counties, it would be possible to have one judge from each county on the appellate division. In the fifth district, judges probably could be chosen from different parts of the district to create a reasonably representative panel. In the first district, where population is heavily weighted toward the urban Bay area, "representation" of the rural northern counties might require having one appellate division seat "reserved" for a judge from that region. Selecting a representative appellate division may be somewhat more complicated because of its diversity (including agricultural areas, mountain resorts, and sparsely populated high deserts), in addition to its large size and large number of counties.

Local practices in assignment of judges – Having a district-wide appellate division would generally reduce the number of judges from any one county assigned to the appellate division to no more than one. In districts with a large number of counties, the courts in many counties would have no judges on the appellate division much of the time. Courts would not be able to continue their previous practices in recommending judges for appellate division assignments. We do not have information on how important this may be in various counties, but its possible significance for some judges should be considered.

Summary – A district-wide appellate division riding circuit would be both feasible and practical in the sixth district, although it would not be a full-time assignment. It would not be feasible in the second or fourth districts because of workload. In the first district it would be feasible and a full-time assignment, but practical difficulties because of distance between the Bay area and the northern rural counties would have to be worked out. In the fifth district, it would be feasible, but the travel inefficiencies would need to be considered. In the third district, it would be feasible in terms of workload, but probably impractical because of the amount of travel required.

a. Four judges for whole district, sitting in one location.

An alternate model for a district-wide appellate division is to appoint the same four judges for all superior courts in the district, but have them sit permanently in one location rather than travel to each county. This has several advantages: reduction of travel costs, greater convenience for the judges and their staff, greater flexibility in scheduling sessions. On the other hand, inconvenience and expense would be increased for parties and attorneys in locations distant from where the appellate division sits. In addition, there is a legal question as to whether the appellate division of a superior court can hold sessions outside the county.

The factors of workload and local assignment practices have about the same effect in this model as in the previous model. As in the previous model, a single district-wide appellate division is not feasible in the second or fourth districts because of workload.

Extent of travel required – Travel expenses would generally be limited to the expenses of judges who reside a long distance from the location in which the appellate division sits. Trips from county to county would not be required, which would save both time and money. For the court this is a more efficient model. However, it is more expensive and inconvenient for some parties and attorneys.

In the sixth district, the distances between the county seats are generally less than the distance across one of the counties. Neither judges nor the public using the courts are likely be significantly impacted by having an appellate division in only one location. The travel distance for a person travelling from southern Monterey County to San Jose (at the opposite end of the district) would be about 100 miles. In the fifth district, if the appellate division were centrally located (perhaps in Fresno, where the court of appeal sits), the maximum travel distance would also be about 100 miles. These distances appear to be reasonably convenient.

Distances in the first and third districts pose greater problems. In the first district, a centrally located appellate division would require people from the most distant parts of the district to travel 200 miles each way. That is significantly less convenient, and it would impact a large number of people, because most of the population is in the southern end of the district. On the other hand, if the appellate division sat in San Francisco (where the court of appeal sits), people from the northern end of the district would have to travel about 370 miles one way.

In the third district, the situation is similar. A centrally located appellate division (perhaps near Chico) would nevertheless be 200 miles away from the northern counties and 350 miles away from Mono County. The major population center (Sacramento) is at the southern end of the district, 300 miles away from the northern end. The number of people affected by travel inconveniences would be relatively small, since the caseload in the third district is light, and the counties most distant from the Sacramento Valley have

only a handful of cases per year. However, travel difficulties may be greater than the distances suggest because of the terrain and climate.

One solution to this problem may be to permit appearance by telephone. The First District Court of Appeal, for example, has a telephone conference call system that enables attorneys to present oral arguments by telephone. (Internal Operating Practices and Procedures, § 21.)

Absence from home county – A judge working full-time on the appellate division would not need to be in the location where the appellate division sits every day. According to our survey, the full-time appellate division in Los Angeles hears oral argument twice per month, spending only five to ten hours total per month. (In other counties, no more then five hours per month is generally spent hearing oral argument.) This indicates that even a full-time appellate division would need to convene in one location only about two days per month. The judges themselves would probably need to meet more often, but some of those meetings could be by conference call.

In the sixth district, a judge's absence from his or her home county would not be a problem because distances are small. In the fifth district, this likely would not be a problem for a judge assigned even from the locations most distant from where the appellate division sits. Because of the light caseload, appellate division work would take no more than a week per month for the assigned judges. Assuming the appellate division sat in Fresno, a judge from Bakersfield would need to make a round trip of 200 miles only a few days per month at most.

Absence from the judge's home county is a more significant factor for the first and third districts. In the first district, the assignment would be full time. Judges living too far away to commute would have the option of relocating for the duration of the assignment because they would not have other cases to hear in their home county. Alternatively, they could travel a few days per month (perhaps twice a month) to the location where the appellate division sits. One disadvantage of the latter option would be the fact that most if not all support staff would be at the appellate division's location.

In the third district, the appellate division assignment would probably be about one-quarter time (250 cases per year that require a panel of three judges). This would generally eliminate relocation as an option. However, the judges could still do most of their appellate division work together in one location. A judge from Siskiyou County, for example, could spend one week a month in Sacramento on appellate division cases and the rest of the time doing trial work in his or her home county.

Local appointments – One solution to the relocation or travel problem for judges would be to appoint only judges from areas close to the location where the appellate division

sits. This would be convenient and legally permissible. However, it would raise political problems.

In large districts (particularly the first and the third) judges in the "outlying" counties would, in practice, not be eligible for assignment to the appellate division. Assuming an appellate division assignment is desirable, this would be unfair. It might also be taken to suggest that judges in counties near the seat of the appellate division are "superior" to or more qualified than those in more distant counties, because they could be appointed to review the decisions of judges in the outlying counties, while the reverse would not be true. This could be considered disenfranchising for the general population in the outlying counties. None of the judges elected by people in those counties could serve on the appellate division, while those elected in certain other counties could. Conceivably, this could create potential Voting Rights Act issues.

Differences in legal culture and cultural differences generally also raise issues. If the legal culture in the area where the appellate division sits and from which judges are assigned is seen as significantly different from that in outlying areas, it may be perceived as having been "elevated" above that in the outlying counties. The judges of the "central" legal culture could overturn decisions of the judges in the outlying areas. This might also carry an urban/rural theme. In the first and third districts, the main population centers (and where the courts of appeal sit) are urban areas. The most distant parts of the district are generally also the most rural. The danger would be creating a *structure* that says judges (or justice) are better in the city than in the country.

Frequency of sessions – Scheduling at least one session per month for each county does not create travel problems because all sessions are in the same location. In the third, fifth, and sixth districts, one one-day session per month would probably be sufficient for hearings. In the first district, more than one day would generally be required; these could be consecutive days (for one session per month) or perhaps two shorter sessions per month, as in Los Angeles.

The appellate division would also have the option of holding some sessions in other locations for the convenience of litigants and attorneys. Rule 101 would permit this. The court of appeal in some districts holds such "circuit-riding sessions" when there are sufficient appeals to constitute one full day's calendar. (First Dist., rule 10; Third Dist., rule 31; Fifth Dist., rule 1.)

Legal issue – Holding sessions of the appellate division for various counties in one place raises a legal question. May the appellate division of the superior court in one county hold a session outside of that county? Neither the constitutional nor statutory provisions on the appellate division specifically address this question. But other provisions suggest that the appellate division is a part of the superior court and that the superior court may hold sessions only within the county, with certain specific exceptions.

There is a superior court in *each* county and there is an appellate division in *each* superior court. (See Cal. Const., art. VI, § 4.) This implies that an appellate division is part of a superior court in one county. Generally, a superior court holds sessions only at certain locations within its own county. (See Gov. Code, §§ 69510, 69741 et seq.) Provisions for sessions at certain other locations are limited to specific circumstances. (See, e.g., Code Civ. Proc, §§ 73c, 651.)

Provisions on judicial emergencies authorize the Chair of the Judicial Council to authorize superior or municipal court sessions "anywhere within the county" or to transfer a civil case to another court within the county. (Gov. Code, § 68115(a), (b).) A civil case may be transferred to a court in an adjacent county, but only if all parties consent or a party shows that extreme or undue hardship would result if the case is not transferred for trial. (Gov. Code, § 68115(c).) These provisions clearly imply that trial courts generally may not hold sessions outside their own county.

In a brief search of caselaw, we did not find any cases specifically holding that a superior court may not hold a session outside of the county. However, when a judge who was assigned to hear a case in another county heard the case in his home county, the court of appeal noted the "impropriety involved in this irregular procedure." (*Desert Turf Club v. Board of Supervisors of Riverside County* (1956) 141 Cal.App.2d 446, 456.)

On the other hand, rule 101 states that the appellate division of a superior court shall hold regular sessions each month at times "and at a place to be determined by the judges" of the appellate division by order entered in the minutes. Additionally, the appellate division "may hold sessions at any other time and place found necessary or convenient." This would provide authority for the appellate division to hold sessions outside its own county, if that is not inconsistent with statute.

Perhaps a helpful approach would be to focus on the difference between appellate courts and trial courts. The functions of the appellate division and the policy considerations that apply to it are more like those of the court of appeal than the superior court sitting as a trial court. Convenience of witnesses and a local jury are not issues, for example. Certain provisions that give appellate courts generally authority to do things that trial courts cannot do may provide a basis for excepting the appellate division from the general territorial limitations of superior courts. Additionally, it may be useful to note that with the passage of Proposition 220, the provision establishing the appellate division was placed in the Constitution for the first time. Previously the appellate department was established only by statute.

Another approach might be to use the technical device of transferring cases from other counties to the county where the appellate division sits. We have not found a provision that either permits or prohibits this. An appellate division may certify a case to the court

of appeal, and a court of appeal may order an appellate division case transferred to itself. (Code Civ. Proc., § 911; Pen. Code § 1471; rules 62, 63.) Perhaps a transfer from one appellate division to another could be authorized by rule, assuming this is not inconsistent with statute. The Constitution specifies that the Judicial Council shall adopt rules "to promote the independence of the appellate division." (Art. VI, § 4.)

A complete exploration of the legal issues is beyond the scope of this memo. Legislation may be necessary to authorize or to clarify the authority for a district-wide appellate division to sit in one location. The general provisions in the Constitution on superior courts and the appellate division do not appear to prohibit a district-wide appellate division.

Summary – In the first, third, fifth, and sixth districts, a district-wide appellate division sitting in one location would likely be practical and feasible for the courts and judges. An assignment to the appellate division would be full time only in the first district. A district-wide appellate division would not be feasible in the second and fourth districts because of the workload; the districts would have to be divided.

In the first and third districts, the inconvenience for parties and attorneys from distant counties needs to be considered. Travel problems for the judges would probably be minor. Appointing judges only from areas close to the city where the appellate division sits could be considered unfair and provoke opposition.

A district-wide appellate division in one location raises legal questions. Statutes arguably would not permit the appellate division of the court in one county to hold sessions in a different county. This issue should be resolved, perhaps with new rules and/or legislation, before this model is implemented.

a. Four judges for each of several subdivisions of a district, either riding circuit or in one location.

The workload in the second and fourth districts is too large for a single district-wide appellate division. That model might be used, however, for subparts of those districts.

Second district – The appellate division for Los Angeles is already full time, so it could continue as it is. The remaining three counties have about 260 cases per year for the appellate division, about 170 of those requiring a panel of three judges. This would require less than one week of appellate division work per month for the assigned judges. Distances are comparable to those in the sixth district, so travel would not be a significant problem for judges or people using the court, whether the appellate division sat in one location or rode circuit to all three counties.

Fourth district – The court of appeal for the fourth district is divided into three geographical divisions. The appellate divisions could be similarly divided.

According to our survey, San Diego County has nearly as many appellate division cases as Los Angeles, but it does not work full time. Perhaps this is because it does not issue as many written decisions. Imperial County, the other county in Division One of the Fourth District Court of Appeal, has a small number of cases. It is likely then, that four judges could handle all the appellate division cases in both San Diego and Imperial counties. Because of the relatively small geographical area, a "division-wide" appellate division is also likely to be practical here in terms of the concerns discussed in previous sections.

The remaining two divisions, comprising Riverside, San Bernardino, Inyo, and Orange counties, have about 530 appellate division cases per year. This is about enough cases for a half-time appellate division, so one appellate division panel of four judges for those counties would be sufficient in terms of workload.

Geographical issues in this group of counties may be significant, but generally of lesser impact than in the first and third districts. The distance from the northern end of this area to the southern part is about 300 miles. As in the first and third districts, population is concentrated in the south. All the county seats except Inyo's are in the southwestern corner of the area. If the judges rode circuit they would only need to make a few trips per year to Inyo County because that county has very few appellate division cases. Conversely, if the judges sat in one location, the number of people impacted by travel difficulties would be small.[1] This could be mitigated by allowing appearances by telephone conference call.

The area covered by the four counties is large enough to raise issues of regional representation. There could be one judge from each county, but this may not be practical because Inyo County has only two judges. Nevertheless, an effort could be made to have some representation of the more rural eastern and northern areas on most appellate divisions.

Summary – The second and fourth districts could use a district-wide model for their appellate divisions by subdividing the districts. In the second district, Los Angeles could keep a full-time appellate division as it has now, and San Luis Obispo, Santa Barbara, and Ventura counties could share another four-judge appellate division. The latter would not be full-time, but the workload and distances could easily be managed.

[1] Additionally, the greatest distances would be smaller than the greatest distances in the first and third districts. The distance between Bishop, near the northern border of Inyo County, and San Bernardino (the most centrally located large city in the four-county group), is only 250 miles.

The fourth district could be divided into two parts. San Diego and Imperial counties could share a full-time appellate division without geographical problems. Orange, Riverside, San Bernardino, and Inyo counties could have a half-time appellate division with minor problems of distance in a few cases.

a. Four judges for two or more districts, or parts of districts, to ensure a full-time workload.

As the above three sections describe, some version of a district-wide appellate division appears to be workable in all districts. Not all of those appellate divisions, however, would be full-time. Only the appellate divisions of the first district, Los Angeles County, and Division One of the Fourth District would be full-time. Some of the remaining areas could have full-time or more nearly full-time appellate divisions if they were combined.

One possibility, mentioned in part 1, would be one appellate division for the fifth and sixth districts. Distances would still be modest; most locations are within 200 miles of other locations in the area. A central location for the court would be more practical than riding circuit because there would be 13 counties. The workload would still probably be less than half-time (about 450 cases per year).

One way to bring the workload closer to full-time would be to include the three second district counties outside Los Angeles. This would bring the number of cases to over 700. Geographical problems, however, would be greater. A mountain range separates the populations centers of Ventura, Santa Barbara, and San Luis Obispo counties from the fifth and sixth districts. Travel between the coast and the Central Valley may require flying or driving an extra 100 miles around the mountains. The combined area would have two natural population centers that would tend to compete. Therefore, this may not be a viable option.

Another possibility would be to include the second and third divisions of the fourth district. This, however, would create a total area even larger than the third district. Additionally, it would have two competing population centers, the cities east of Los Angeles and the Central Valley. This also may be impractical.

The remaining area with a part-time appellate division workload is the third district. If the judges rode circuit, it would probably not be feasible to add any other counties because 23 is already a difficult number to manage. If the appellate division sat in one location, adding counties might be possible. The logical ones to add would be those in the northern part of the fifth district. Perhaps the entire fifth district might be included. The workload would be about 600 cases per year (still less than full-time). Assuming the appellate division would sit in Sacramento, travel times would be increased for many people in the fifth district. Generally, they would be no greater than for people in outlying parts of the third district, but a greater number would be affected. Kern County

is about as far from Sacramento as is Siskiyou County, but Kern has 100 appellate division cases per year in comparison to less than 10 in Siskiyou. The advantages of having a more nearly full-time appellate division may be outweighed by the inconveniences of geography.

In a district with small counties, there may be an advantage to having a part-time appellate division. Assigning a judge from a two-judge county to a full-time appellate division may create workload problems for the trial court in that county. Excluding judges in small counties raises the problems of fairness and representation discussed in part 2. A part-time workload may avoid these issues.

a. Appellate division of more than four judges for whole district.

One way to avoid splitting the second and fourth districts would be to have a district-wide appellate division of more than four judges. Five or six judges could probably handle the workload in those districts. With six assigned judges, two panels of three would be possible. Having a larger number of judges could also be helpful in areas where geographical distances are a problem. Additionally, the larger number would increase flexibility and make it easier to avoid disqualifications because of previous involvement in a case.

Increasing the number of judges on the appellate division would require amendment of Code of Civil Procedure section 77. This could be done several ways.

Delete specification of number in statute – The first sentence of section 77(a) could be amended to read simply, "In every county and city and county, there is an appellate division of the superior court." The statute would be silent as to the number of judges. By implication, the number would be at the discretion of the Chief Justice and/or decided by the Judicial Council. The next paragraph of section 77 and the Constitution provide that the Chief Justice shall assign judges to the appellate division for specified terms pursuant to rules adopted by the Judicial Council.

This option creates maximum flexibility. It permits the Chief Justice and the Judicial Council to respond to changing conditions and tailor assignments to needs of individual counties.

Number determined by Judicial Council – Another option is to change the statute to state that the council will decide how many judges should be on each appellate division. The number of judges and other provisions could be specified by rule, allowing easier amendment to respond to changes and new problems. This would have the advantage of making clear who has the authority to decide how many judges will be assigned to the appellate division.

Change statutory maximum from four to six – If there is any controversy about having no statutory limit on the number of appellate division judges, six is probably a sufficient number of judges for the appellate division in any district. Districts that did not need six could have fewer judges.

The major disadvantage of this change is that it is less flexible. The number of appellate division judges could not be increased to more than six to cope with an increased workload because of an increase in population or the kinds of cases heard by the appellate division.

a. Four judges appointed for the appellate division in each county (with overlap), but judges appointed for one county could sit a on panel in any county in the district.

This model is designed to increase the number of appellate division judges in the district without increasing the number assigned for any one county. The concept is similar to blanket cross-assignments. Four judges would be assigned to the appellate division in each county in a district. In many counties within the district, the same four judges would be assigned, but some wo uld have one or more different judges. Then the appellate division judges for each county would be cross-assigned to the appellate divisions in the other counties in the district.

This is analogous to what is now done in some trial courts, but it is not clear whether current law would allow this in the appellate division. A statutory change might be required because more than four judges would actually be eligible to sit on a panel in any particular county.

The Chief Justice has broad constitutional authority to assign judges to different courts:

> The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court. (Art. VI, § 6.)
>
> A judge eligible for municipal court service may be assigned by the Chief Justice to serve on any court. (Art. VI, § 15.)

Several cases have upheld cross-assignments in the trial courts, rejecting arguments that they violate election requirements or the statutes specifying the number of judges on each court. The Chief Justice may assign a judge to a particular court for a specified time period, without indicating the particular case in which the judge is to act. (*Gialdini v. Russell* (1933) 134 Cal.App. 524, 528.) Assignment of a superior court judge to a superior court of a different county does not require a showing that there was actual

congestion of the court at the time of trial. (*People v. Ferguson* (1932) 124 Cal.App. 221, 230–232.) Assignment orders may be issued in the form of blanket assignments, appointing all judges of one court to sit on another court for a limited period of time. (*People v. Swain* (1995) 33 Cal.App.4th 499.)

In contrast to trial court judges, however, appellate division judges are not elected or appointed to the appellate division. They are assigned in the first place by the Chief Justice. The appellate division in each county consists of three or four judges, assigned by the Chief Justice. (Code Civ. Proc., § 77(a).) Assignment of a greater number (even as a cross-assignment) could be considered an assignment exceeding an express limitation in the statute.

This model would allow a great deal of flexibility and local representation on each appellate panel. It would also permit some judges to be appellate division "specialists."

Appendix D.
Proposed Amendments to Rules of Court

CALIFORNIA RULES OF COURT
TITLE ONE. APPELLATE RULES
DIVISION I. RULES RELATING TO THE SUPREME COURT , ~~AND~~ COURTS OF APPEAL , *AND APPELLATE DIVISIONS OF THE SUPERIOR COURT*
CHAPTER I. RULES ON APPEAL
PART I. FILING APPEAL

Rule 1. Filing notice of appeal

(a) [Form of notice] An appeal from a judgment of a superior court or from a particular part of the judgment ***, except in a small claims case,*** is taken by serving and filing with the clerk of that court a notice of appeal from that judgment. The notice shall be signed by the appellant or by his or her attorney and shall be sufficient if it states in substance that the appellant appeals from a specified judgment or a particular part of the judgment. A notice of appeal shall be liberally construed in favor of its sufficiency. The notice need not specify the court to which the appeal is taken and ***in an unlimited civil case*** shall be deemed to be an appeal to the Court of Appeal for the district. ***An appeal in a limited civil case shall be deemed to be an appeal to the Appellate Division of the Superior Court.*** Failure to serve the notice shall not prevent its filing and shall not affect the validity of the appeal, but on reasonable notice the appellant may be required to remedy the failure.

(b) [Notification by clerk] The clerk of the superior court shall forthwith mail a notification of the filing of the notice of appeal to the attorney of record of each party other than the appellant, or if the party is not represented by an attorney, then to the party at the party's last known address. The notification shall state the number and title of the action or proceeding and the date the notice of appeal was filed. Such mailing is a sufficient performance of the clerk's duty notwithstanding the death of the party or the death, discharge, suspension, disbarment, or disqualification of the attorney prior to the giving of the notification.

The clerk of the superior court shall also forthwith transmit a notification of the filing of the notice of appeal to the clerk of the reviewing court. The notification shall state the names, addresses, telephone numbers, and California State Bar membership numbers of all attorneys of record in the case, to the extent the information is available, and the parties whom they represented in the superior court.

The notifications required by this subdivision may take the form of a copy of the notice of appeal, so long as the required information is on the copy or is added by the

clerk of the superior court. The failure of the clerk to give the notifications required by this subdivision shall not affect the validity of the appeal.

The clerk of the superior court shall also forthwith mail a copy of the sequential list of reporters made pursuant to rule 980.4 to the parties, and transmit the list to the clerk of the reviewing court.

(c) [Payment of filing fee in civil appeals] A party filing a notice of appeal ***in an unlimited civil case*** shall simultaneously deliver to the clerk of the superior court the filing fee of $265, which should be in the form of a check or money order payable to the clerk of the Court of Appeal. ***A party filing a notice of appeal in a limited civil case shall simultaneously deliver to the clerk of the superior court the filing fee of $50, which should be in the form of a check or money order payable to the clerk of the Superior Court.*** If the fee is delivered in cash, the clerk of the superior court shall give a receipt. The notice of appeal shall be accepted for filing even though the filing fee is not paid, subject to rule 10(a). The appellant shall also deposit any sum required by Government Code section 68926.1 (clerk's transcript or index).

(d) [Excuse from payment of filing fee] If the appellant is indigent, payment of the filing fee may be excused on the same basis as payment of a filing fee in the trial court is excused.

(e) [Transmission of filing fee or equivalent by clerk of superior court] The clerk of the superior court shall transmit the filing fee to the reviewing court with the notification of filing of the notice of appeal. If the filing fee was paid in cash the clerk of the superior court shall certify in writing that the fee was paid and thereafter transmit a check to the reviewing court. If payment of the fee was excused because of the appellant's indigency, the clerk shall transmit a copy of the order excusing payment with the notification of filing of the notice of appeal.

(f) [Notice of cross appeal] As used in this rule, "notice of appeal" includes notice of cross-appeal, and "appellant" includes respondent who files notice of cross appeal.

Comment. Rule 1 is amended to reflect unification and the repeal of Rule 121. Notice of appeals in criminal cases are governed by Rule 31.

PART II. RECORD ON APPEAL

Rule 10. Notification of appeal; transmission and filing of record

(a) [Action upon receiving notification of notice of appeal] If the reviewing court receives a notification of filing of a notice of appeal that is not accompanied by the filing fee or the superior court clerk's certificate that the fee had been paid or by a copy of an order excusing payment of the fee, or if a check given in payment of the filing fee is returned dishonored, the clerk of the reviewing court shall forthwith notify the appellant in writing that the appeal will be dismissed unless, within 15 days after the mailing of the notice, the appellant either tenders the fee and shows good cause why it was not paid or shows good cause why the fee should be excused.

If an adequate excuse for nonpayment is not shown within that time the appeal may be dismissed forthwith.

(b) [Filing the record] When the record on appeal has been completed in accordance with these rules the clerk shall forthwith transmit any original transcripts or agreed or settled statements to the reviewing court. When these are received the record shall be filed.

The clerk of the reviewing court shall forthwith mail notice to the parties stating the date the record was filed.

(c) [Failure to procure record; dismissal of appeal] If the appellant fails to perform any act necessary to procure the filing of the record within the time allowed or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion.

Upon appellant's default, the clerk of the superior court shall forthwith mail a notice to the appellant. The notice shall inform the appellant that the appeal will be dismissed by the reviewing court if appellant fails to perform the act(s) necessary to procure the record as enumerated in the notice within 15 days of the date of the mailing of the notification. If the appellant fails to do the act(s) within this time the clerk of the superior court shall notify the reviewing court and the appeal may be dismissed.

(d) [Transmission of exhibits] When the parties shall have been notified by the clerk of the reviewing court that an appeal has been set for hearing, each party shall file with the clerk of the superior court a notice specifying the original exhibits either admitted in evidence or rejected that he desires transmitted to the reviewing court, and the clerk shall immediately transmit them to the reviewing court. The clerk of the superior court shall arrange and list them, and two duplicates of such list shall be forwarded with them. If the list is found correct, one duplicate shall be signed by the clerk of the reviewing court and returned to the clerk of the superior court. If any papers are illegible or otherwise unusable, the reviewing court may require that copies be made and filed. The reviewing court at any time may request that any original exhibits be transmitted to it by the clerk of the superior court. The reviewing court on application may return any original exhibit to the superior court for use in any other proceeding, and on the issuance of the remittitur, they shall be returned to the superior court.

(e) [Use and disposal of copies] The additional copy of the record required by these rules shall on completion be transmitted forthwith by the clerk to the appellant.

When the respondent does not procure a copy of the record and so notifies the appellant at any time not more than 20 days after the filing of the record in the ~~Court of Appeal~~ ***reviewing court***, the appellant shall at the time of serving the opening brief deliver the additional copy of the record to the respondent. The respondent shall redeliver the copy to the appellant at the time of serving respondent's brief or, if the respondent does not file a brief, at the time the brief is due. The parties may stipulate to use of the additional copy in a manner other than provided by this rule.

When the judgment on appeal is final and no further proceedings in the case are pending, unless the parties stipulate otherwise, the party who bore the cost of the additional copy of the record is entitled to it.

Comment. Rule 10(e) is amended to replace "Court of Appeal" with the more general term "reviewing court" which encompasses the Appellate Division of the Superior Court.

PART III. BRIEFS

Rule 14. Additional briefs

(a) [Respondent's brief] Every respondent shall file a respondent's brief, except that a respondent may join in a brief or may adopt by reference any brief in the same or companion cases. Any appellant may file an appellant's reply brief. No additional or supplementary briefs may be filed except by permission of the Chief Justice ~~or Presiding Justice~~ ***, Presiding Justice or Presiding Judge***.

(b) [Brief of amicus curiae in Supreme Court] An individual or entity desiring to support or oppose (1) the granting of a petition for review or original writ in the Supreme Court, or (2) the accepting of a request for an answer to a certified question under rule 29.5, shall lodge a letter in the Supreme Court in lieu of a brief of amicus curiae. The letter shall state the nature of the applicant's interest and conform to the requirements of rule 28(e) regarding incorporation of documents by reference and annexed material. The letter shall be accompanied by proof of service on each party to the action or proceeding and, if the letter concerns a request for an answer to a certified question, on the requesting court. The court may, in its discretion, elect to consider the letter and may, in its discretion, cause the letter to be filed in the action or proceeding. The fact that a person lodged a letter on the question of granting the petition or of accepting the request does not constitute leave for that person to file a brief amicus on the merits if the petition is granted or the request is accepted; all persons seeking to file a brief amicus on the merits shall comply with the requirements of the next paragraph and briefs on the merits in the Supreme Court shall conform as nearly as possible to the requirements of rule 29.3(c).

A brief of amicus curiae in the Supreme Court on the merits of an action or proceeding may be filed on permission first obtained from the Chief Justice. To obtain permission, the applicant shall file with the clerk of the Supreme Court a signed request, accompanied by the proposed brief, stating the nature of the applicant's interest and setting forth facts or questions of law that have not adequately been presented by the parties and their relevancy to the disposition of the case. The request and proposed brief must be received by the court no later than 30 days after all briefs, other than supplemental briefs, that the parties are entitled to file pursuant to rule 29.3 either have been filed or can no longer be filed within the time limits prescribed by that rule. The Chief Justice may grant leave for later filing if the applicant presents specific and compelling reasons for the delay.

The Attorney General may file an amicus curiae brief without obtaining the Chief Justice's permission, unless the Attorney General is presenting the brief on behalf of another state officer or agency. The Attorney General shall file the brief within the time provided above for receipt of a request for permission to file an amicus curiae brief. The brief shall contain the information required in a request for permission to file an amicus curiae brief.

Before any amicus curiae brief is filed, it shall be served on all parties. The cover of the brief shall identify the party--if any--the brief supports.

Any party may file an answer within 20 days after an amicus curiae brief is filed. Before any answer is filed, it shall be served on all parties and the amicus curiae.

(c) [Brief of amicus curiae in Court of Appeal *or Appellate Division of the Superior Court*] A brief of amicus curiae in a Court of Appeal ***or an Appellate Division of the Superior Court*** on the merits of an action or proceeding may be filed on permission first obtained from the presiding justice ***or presiding judge*** subject to conditions which may be prescribed. To obtain permission, the applicant shall file with the clerk of the reviewing court a signed request that states the nature of the applicant's interest and specifies the points to be argued in the brief. The request shall state that the applicant is familiar with the questions involved in the case and the scope of their presentation and believes there is a necessity for additional argument on the points specified. If the application is granted, the time within which the brief may be filed and the time within which any party to the appeal may file an answer to it shall be specified.

The Attorney General may file an amicus curiae brief without obtaining the presiding justice's ***or presiding judge's*** permission, unless the Attorney General is presenting the brief on behalf of another state officer or agency. The Attorney General shall file the brief within 14 days after the last respondent's brief--or the return--is filed. The brief shall contain the information required in a request for permission to file an amicus curiae brief. Any party may file an answer within 14 days after the Attorney General files a brief.

Before any amicus curiae brief is filed, it shall be served on all parties. Before any answer is filed, it shall be served on all parties and the amicus curiae. The cover of the brief shall identify the party--if any--the brief supports.

(d) [Briefs on cross-appeal] When a cross-appeal is taken pursuant to rule 3, the respondent, as cross-appellant, need not file a separate brief on the cross-appeal but may include, in a separate section of his reply brief, the points he desires to raise on his cross-appeal. The appellant, as cross- respondent, may reply thereto in a separate section of his reply brief, and the cross-appellant may file a reply brief confined to points on his cross-appeal.

Comment. Technical amendments necessary to make Rule 14 apply to Appellate Divisions.

Rule 14.5. Requests for judicial notice

(a) [Motion required] In a cause pending before the Supreme Court ~~or~~ **,** a Court of Appeal ***or an Appellate Division of the Superior Court***, a request that the court take judicial notice under Evidence Code section 459 shall be made by a motion under rule 41 filed separately from a brief or other paper.

(b) [Proposed order] The motion shall include a proposed order.

(c) [Copy of matter to be noticed] Unless the matter to be judicially noticed already appears in the record on appeal, a copy of the matter shall be filed and served with the motion, or the motion shall explain why it is not practicable to do so.

Comment. Technical amendments necessary to make Rule 14.5 apply to Appellate Divisions.

Rule 15. Form of briefs

(a) [Headings, references, index and tables] Each point in a brief shall appear separately under an appropriate heading, with subheadings if desired. Such headings need not be technical "assignments of errors" but should be concise headings which are generally descriptive of the subject matter covered. The statement of any matter in the record shall be supported by appropriate reference to the record. Every brief shall be prefaced by a topical index of its contents and a table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities.

(b) [Means of producing; common provisions]

(1) Briefs in civil cases may be (i) typewritten, or (ii) proportionally spaced.

(2) "Typewritten" means literally produced on a typewriter or, if produced on a word processor or other computer, printed in a type size and style that emulate a typewriter's type. The type shall not be proportionally spaced; each letter shall occupy the same horizontal space as every other letter. The type shall be letter quality.

(3) "Proportionally spaced" includes (i) briefs produced by a commercial printer using letterpress, photocomposition, lithography, or equivalent processes, and (ii) briefs produced on a word processor or other computer and printed in proportionally spaced type. The spacing between letters shall be the standard spacing as determined by a commercial printing or word-processing program, without modification. The type shall be letter quality as provided in subdivision (b)(5).

(4) Briefs reproduced by photographic or xerographic processes are classified as "typewritten" or "proportionally spaced" on the basis of the method used in producing the original.

(5) "Letter quality" means that the characters appear to be produced by the impact of a solid piece of type. If characters are produced by a dot matrix process, that process shall produce at least 300 dots per inch horizontally and vertically.

(6) Unless otherwise provided in this rule, all briefs shall comply with the following specifications:

(i) Briefs shall be printed on opaque, unglazed recycled paper, white or unbleached, of not less than 20-pound weight, 8 1/2 by 11 inches.

(ii) Briefs shall be bound in book or pamphlet form with suitable covers. If stapled, the bound edge and the staples shall be covered with tape.

(iii) The cover shall contain the title of the case, the name of the trial judge and county, the designation of the brief, the name, address, and telephone number of the attorney filing the brief, and the California State Bar membership number of that attorney and of each attorney who joins in the brief. California State Bar membership numbers of the supervisors of the attorney responsible for the case in a law firm or public law office do not need to be stated.

(iv) Except when typewritten originals and carbon copies are filed with permission, both sides of the paper may be used, with each side numbered as a separate page. Pages shall be numbered at the top or bottom and bound on the side. Different numbering series may be used for tables and indices and for the body of the brief subject to the page limitation.

(c) [Typewritten briefs] If the brief is typewritten, the following specifications apply:

(1) Typewritten original ribbon copies of the brief and carbon copies may not be filed unless specially permitted by the Chief Justice ~~or~~ **,** presiding justice ***or presiding judge***. Permission will ordinarily be granted only to parties without counsel who are proceeding in forma pauperis. In all other cases, photographic or xerographic reproductions of the typewritten original shall be filed.

(2) Only one side of the paper shall be used if typewritten original ribbon copies and carbon copies are filed.

(3) The type shall be at least as large as standard pica or 12-point type in the Courier font or equivalent, spaced 10 characters per horizontal inch. Incarcerated litigants proceeding in propria persona may use elite type, 12 characters per inch, if that is the only kind of typewriter available to them.

(4) The lines on each page shall be spaced no more closely than 1 1/2 spaced, based on single spacing being six lines to a vertical inch and double spacing being three lines to a vertical inch. Footnotes and indented quotations may be single spaced.

(5) The margins shall be not less than 1 1/4 inches on the left side or on the side next to the binding if both sides of the paper are used, and one inch on the top, bottom, and side opposite the binding, so that each line is no longer than 6 1/4 inches.

(6) Lines on the pages shall be unnumbered. Headings shall be capitalized, boldfaced, or underscored. Quotations longer than two lines shall be block indented.

(d) [Proportionally spaced briefs] If the brief is proportionally spaced, the following specifications apply:

(1) The type including footnotes shall not be smaller than 13-point Times New Roman type.

(2) The lines on each page shall be spaced no more closely than 1 1/2 spaced, based on single spacing being six lines to a vertical inch and double spacing being three lines to a vertical inch. Footnotes and indented quotations may be single spaced.

(3) The margins shall be not less than 1 1/2 inches on each side (so that each line is no longer than 5 1/2 inches) and one inch on the top and bottom.

(4) Lines on the pages shall be unnumbered. Headings shall be printed in a type distinguishable from that used in the body. Quotations longer than two lines shall be block-indented.

(e) [Length] Excluding tables and indices, a brief shall not be longer than 50 pages, whether the brief is typewritten or proportionally spaced ***; provided, however, that a brief filed in the Appellate Division of the Superior Court shall not exceed 15 pages in length.*** A longer brief may be specially permitted by Chief Justice ~~or~~ **,** presiding justice ***, or presiding judge***.

(f) [Authority to reject briefs] In addition to the authority of the clerk under rule 46, the clerk or the court may reject for filing or strike any brief that is not clearly legible, or that appears to be printed with the characters artificially close to each other.

(g) [Operative date] The changes in subdivisions (b), (c), (d), and (e) that were adopted July 1, 1996, apply in cases in which the appellant's opening brief, or the petition

in the case of original proceedings, is filed after July 1, 1996. The rule in effect on June 30, 1996, applies in other cases.

(h) [Unfair competition cases] In an unfair competition proceeding under Business and Professions Code section 17200 et seq., each brief and petition shall contain the following statement on the front cover: "Unfair competition case. (See Bus. & Prof. Code, ' 17209 and Cal. Rules of Court, rule 16(d).)"

Comment. Rule 15(e) is amended to retain the existing limit on the length of briefs in the Appellate Division.

Rule 16. Service and filing

(a) [Time] In civil cases appellant's opening brief shall be served and filed within 30 days after the filing of the record (or the reporter's transcript if there was an election under rule 5.1) in the reviewing court, or within 70 days after filing a notice of election under rule 5.1 if the appellant did not serve and file a notice to prepare a reporter's transcript; respondent's brief shall be served and filed within 30 days after filing of appellant's opening brief; and appellant's reply brief, if any, shall be served and filed within 20 days after filing of respondent's brief, except that when there is a cross-appeal pursuant to rule 3 appellant's reply brief which also contains a brief as cross-respondent shall be served and filed within 30 days after filing of respondent's brief containing a brief as cross-appellant, and respondent's reply brief as cross-appellant shall be served and filed within 20 days after filing of appellant's reply brief containing a brief as cross-respondent. By stipulation filed with the reviewing court the parties may extend each of such periods for not more than 60 days, and thereafter the time may be extended only by the Chief Justice ~~or~~ **,** Presiding Justice ***or Presiding Judge***, for good cause shown. No such stipulation shall be effective unless it is filed prior to expiration of the period sought to be extended.

(b) [Copy for trial judge] No brief shall be filed without proof of the deposit of one copy with the clerk of the superior court for delivery to the judge who presided at the trial of the case. The clerk shall deliver the brief to the judge and need not maintain a copy in the court file.

(c) [Service on Attorney General] ***With respect to briefs in the Supreme Court and the Court of Appeal, in*** ~~In~~ all criminal cases, and in all other cases where the State or any officer thereof in his official capacity is a party, and in all cases to which any county may be a party, unless the interest of the county is adverse to the State or to some officer thereof acting in his official capacity, no brief on behalf of the State, or of such county or officer whom the Attorney General is empowered to represent, shall be received or filed without proof of the service of such brief upon the Attorney General.

(d) [Service in unfair competition proceedings] In an unfair competition proceeding under Business and Professions Code section 17200 et seq., each brief and each petition shall be served on the Attorney General of California and the district attorney of the county in which the ~~lower~~ ***trial*** court action was originally filed, as required by Business and Professions Code section 17209. Each brief or petition shall be served within three days of filing unless the time is extended for good cause, as provided in Business and Professions Code section 17209.

Comment. Technical amendments to Rule 16(a) & (d) so these subdivisions will apply to the Appellate Division. Subdivision (c) is amended so that Appellate Division briefs are *not* filed with the Attorney General.

Rule 17. Failure to file brief

(a) [Opening brief] If the appellant's opening brief is not filed within the time prescribed in subdivision (a) of rule 16, the clerk of the reviewing court shall notify the parties by mail that if the brief is not filed within 15 days after the date of mailing of the notification, the appeal will be dismissed unless good cause is shown for relief. If a sufficient written showing of excuse is made within the 15-day period, the Chief Justice ~~or~~ **,** presiding justice ***or presiding judge*** may grant additional time to file the brief subject to such conditions as may be deemed proper to impose; otherwise the appeal may be dismissed forthwith.

If the brief is not filed within the time granted by the Chief Justice ~~or~~ **,** presiding justice ***or presiding judge***, the appeal may be dismissed forthwith. If the notification is not mailed by the clerk or the appeal is not dismissed on the court's own motion, the respondent may move to dismiss the appeal.

(b) [Respondent's brief] If the respondent's brief is not filed within the time prescribed in subdivision (a) of rule 16, the clerk of the reviewing court shall notify the parties by mail that the case may be submitted for decision on the record and on the appellant's opening brief unless the brief is filed within 15 days after the date of mailing of the notification or good cause is shown for relief. If the brief is not filed within that period and no sufficient showing of excuse is made, or if additional time is granted by the Chief Justice ~~or~~ **,** presiding justice ***or presiding judge*** and the brief is not filed within the period as so extended, the court may accept as true the statement of facts in the appellant's opening brief and, unless the appellant requests oral argument, may submit the case for decision on the record and on the appellant's opening brief.

(c) [Criminal appeals] In an appeal in a criminal case, the 15-day time periods in subdivisions (a) and (b) shall, instead, be 30 days.

Comment. Technical amendments necessary to make Rule 17 apply to Appellate Divisions.

PART IV. HEARING AND DETERMINATION OF APPEAL

Rule 19.5. Prehearing conferences in civil cases; settlements

(a) At any time after the notice of appeal is filed, the Presiding Justice ***or Presiding Judge*** may: (1) order the appellant to file a short statement of the nature of the case and the issues on appeal; (2) order counsel for the parties, and any other persons he deems necessary, to appear before a judge of the court for a prehearing conference to consider the simplification of the issues on appeal, the possibility of settlement, and any other matters the designated conference judge determines may aid in the disposition of the appeal. Matters agreed upon shall be reduced to writing and, when executed as a stipulation and approved by the conference judge, shall be filed with the clerk and shall control the subsequent course of the appeal, unless modified to prevent manifest injustice.

(b) The conference judge and any court attache who attends the conference shall not participate in or do anything to influence the consideration or decision of the appeal on its merits.

(c) The statement of the nature of the case and the issues and any matters occurring or said at a prehearing conference, unless stipulated to, approved and filed as provided in subdivision (a), shall not be referred to in any subsequent proceedings in the appeal, except a further prehearing conference or other settlement negotiations.

(d) If a prehearing conference is ordered prior to the date appellant's opening brief is due to be filed, the period for filing the brief is extended to a date 30 days after the conference date specified in the order.

(e) [Notice of settlement] If a civil case is settled after a notice of appeal is filed, the appellant shall immediately give the reviewing court written notice, and shall give telephone or other oral notice if a hearing or conference is imminent. If the record on appeal has not been completed and transmitted to the reviewing court at the time of the settlement, the appellant shall also give written notice to the clerk of the superior court, and include proof thereof with the notice to the reviewing court.

Comment. Technical amendments necessary to make Rule 19.5 apply to Appellate Divisions.

Rule 20. Transfer of causes

(a) [By Supreme Court] Except as provided in (b), causes may be transferred from the Supreme Court to a Court of Appeal, or from a Court of Appeal to the Supreme Court, or from one Court of Appeal to another, or from one division to another, ***or to or from an Appellate Division of the Superior Court from or to any other appellate court*** only on order of the Supreme Court. The clerk of the court from which the cause is transferred shall immediately transmit to the other court the original record, briefs and all original papers and exhibits on file in the cause. If the transfer is made because the appeal is taken to the wrong court, the order may direct the appellant to pay the clerk of the court to which the cause is transferred the fee required by law for the filing of the record in the first instance. If it is so ordered and the appellant fails to pay the fee within 20 days after the mailing of the notice by the clerk that the record has been transmitted and that the filing fee must be paid, the appeal may be dismissed.

The clerk of the court to which the cause is transferred shall promptly send each party a copy of the order of transfer showing the new case number.

(b) [By administrative presiding justice] The administrative presiding justice of a Court of Appeal having more than one division may transfer causes between divisions of the court, as follows:

(1) When two or more causes arise out of the same trial court proceedings, to the division to which the first of the causes to be filed was assigned.

(2) When, because of recusals, the division to which the cause was originally assigned does not have three judges qualified to hear the cause, to another division selected at random by the clerk.

The clerk shall notify the parties of the division to which the cause is transferred, and of the method used in selecting that division. The method used by the administrative

presiding justice and the clerk in selecting the division shall be fair, and shall not permit the transfer to be used to affect the decision of the cause.

This subdivision (b) shall be operative only when it has been approved by the Supreme Court.

Comment. Technical amendments necessary to make Rule 20 apply to Appellate Divisions.

Rule 21. Sessions

(a) [Time and place of sessions] At the times specified by the court, the Supreme Court shall hold regular sessions in San Francisco, Los Angeles, and Sacramento and may hold special sessions elsewhere. Each Court of Appeal and each division thereof shall hold regular sessions at least once in each quarter at times specified by the court. ***Each Appellate Division of the Superior Court shall hold regular sessions at times and places specified by the court for the convenience of the court, parties and counsel.*** Motions will ordinarily be decided without argument, but may be placed on the calendar for any session by order of the court or the ***presiding judge,*** presiding justice or Chief Justice.

(b) [Special sessions] A Court of Appeal, or division thereof, may hold special sessions in another appellate district when:

(1) the causes scheduled for hearing during a special session have been transferred to the court by the Supreme Court from the appellate district in which the special session is to be held, and

(2) the session has been approved by the Chief Justice of California, as Chairman of the Judicial Council.

(c) [Notice of calendar hearing] When an appeal is set for hearing the clerk of the reviewing court shall give written notice to the parties of the time and place of said hearing. This notice may be in such form as the clerk may prescribe, but it shall notify each party that he must file with the clerk of the superior court a further notice specifying such of the designated original exhibits and affidavits as he deems necessary to have transmitted to the reviewing court.

Comment. Technical amendments necessary to make Rule 21 apply to Appellate Divisions. The language in subdivision (a) replaces Rule 101.

Rule 22.1. Oral argument in the Court of Appeal *and Appellate Division of the Superior Court*

(a) [Application] This rule governs oral argument in the Court of Appeal ***and Appellate Division of the Superior Court*** unless the court provides otherwise by order or local rule.

(b) [Time for argument] Counsel for each side is allowed 30 minutes for oral argument. If multiple parties who are represented by separate counsel or counsel for amicus curiae request argument, the court may apportion or expand the time according to the respective parties' interests.

(c) [Order of argument] The appellant or moving party has the right to open and close. If two or more parties file a notice of appeal, the court will indicate the order of argument.

(d) [Number of counsel] No more than one counsel may argue for each party who appeared separately in the court below, unless the court orders otherwise.

(e) [Amicus] Upon written request, the court may grant or deny any amicus curiae the opportunity to argue.

Comment. Technical amendments necessary to make Rule 22.1 apply to Appellate Divisions.

It is a debatable question whether oral argument is legally required in Appellate Division matters. At a minimum, Appellate Divisions can follow the practice of the Court of Appeal, which is to send letters in appropriate cases inviting counsel to waive oral argument. Alternatively, the following language may be considered for inclusion at the end of subdivision (a) to give the Appellate Division greater control over the availability of oral argument: *"An Appellate Division may determine that oral argument is not necessary for the proper resolution of any case and, after informing the parties and counsel of that determination, may decide any case without holding oral argument.*"

Rule 22.5. Time of submission of cause in Court of Appeal *and Appellate Division of the Superior Court*

(a) ***[Submission in Court of Appeal]*** A cause pending in a Court of Appeal is submitted when the court has heard oral argument, or has approved a waiver of oral argument, and the time has passed for filing all briefs and papers, including any supplementary brief permitted by the court.

(b) ***[Vacating submission]*** Submission may be vacated only by an order stating the reasons therefor. The order shall provide for resubmission of the cause.

(c) [After transfer from Supreme Court] If a cause previously decided by opinion by a Court of Appeal is transferred to it by the Supreme Court, the cause is submitted on the latest of (i) 60 days after filing of the last timely supplemental brief, (ii) 60 days after receipt of the record and of the Supreme Court's transfer order if no timely supplemental briefs are filed, or (iii) the time provided in subdivision (a), if oral argument is scheduled within either of the preceding times. The Court of Appeal may order the case submitted at an earlier time if doing so is consistent with rule 29.4 and with any instructions of the Supreme Court.

(d) [Submission in the Appellate Division] Each appeal in an Appellate Division of the Superior Court shall be heard and determined or taken under submission at the session at which it was set for hearing, unless, for good cause to be entered in the minutes, it is continued for hearing to another date, or it is ordered to be submitted on briefs to be filed.

Comment. Technical amendments necessary to make Rule 22.5 apply to Appellate Divisions. The language in subdivision (d) is taken from Rule 106.

Rule 23.5. Form of opinion

The opinion of a Court of Appeal ***or an Appellate Division of the Superior Court*** shall identify the judges participating in the decision, including the author of the majority opinion and of any concurring or dissenting opinion, or the three judges participating when the opinion is designated "by the court."

Comment. Technical amendments necessary to make Rule 23.5 apply to Appellate Divisions.

Rule 24. Decision of reviewing court

(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the ~~lower~~ court or tribunal ***whose decision was under review*** and to the parties ***; provided, however, that a decision by an Appellate Division of the Superior Court may take the form of an order or ruling***.

A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30-day period or any extension, orders one or more additional periods not to exceed a total of 60 additional days. An order of the Supreme Court denying a petition for review of a decision of a Court of Appeal becomes final when it is filed.

A decision of a Court of Appeal ***or an Appellate Division of the Superior Court*** becomes final as to that court 30 days after filing. An order dismissing an appeal involuntarily is a decision for purposes of the preceding sentence. The decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause, or the denial of an application for bail or to reduce bail pending appeal, or the denial ***by a Court of Appeal*** of a transfer to a Court of Appeal in a case within the ~~original jurisdiction of a municipal or justice court~~ ***jurisdiction of the Appellate Division of the Superior Court***, or an order of dismissal of an appeal pursuant to a written request of the appellant or a stipulation of the parties. The denial of a petition for a writ of habeas corpus that is filed on the same day as the decision in a related appeal becomes final as to the Court of Appeal at the same time as the related appeal.

When a decision of a reviewing court is final as to that court, it is not thereafter subject to modification or rehearing by that court, except that when the date of finality falls on a holiday or other day the clerk's office is closed, the decision may be modified or rehearing granted or denied until the close of business on the next day the clerk's office is open. If an opinion is modified without change in the judgment, during the time allowed for rehearing, the modification shall not postpone the time that the decision becomes final as provided above; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

(b) [Whether judgment is modified] An order modifying an opinion shall specify whether it effects a change in the judgment.

(c) [Filing consent to modification] If the reviewing court orders that a judgment be reversed and a new trial granted or that, in the alternative, the judgment be affirmed on condition that the party in whose favor judgment has been rendered consent to a remission of a portion thereof, or on condition that the party against whom the judgment has been rendered consent to an addition thereto, then, unless otherwise ordered, the judgment of reversal and granting of a new trial shall become final unless within 30 days after the filing of the decision two copies of a written consent by such party to the remission or addition shall be filed in the reviewing court. One of the copies shall be transmitted with the remittitur to the superior court.

(d) [Discretionary early finality] Notwithstanding subdivision (a), a Court of Appeal ***or an Appellate Division of the Superior Court*** may order that a decision granting a writ--or denying a writ after issuance of an alternative writ or an order to show cause--within its original jurisdiction shall become final as to that court

(1) Within a stated period less than 30 days or

(2) Immediately, if early finality is necessary to prevent mootness or frustration of the relief granted or is otherwise necessary in the interest of justice.

Comment. Technical amendments necessary to make Rule 24 apply to Appellate Divisions.

Rule 27. Rehearing in court rendering decision

(a) [Power to grant rehearing] The Supreme Court ~~or~~ **,** a Court of Appeal **,** ***or an Appellate Division of the Superior Court*** may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal ***or an Appellate Division of the Superior Court*** of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal in a case within the ~~original~~ jurisdiction of ~~a municipal or justice court~~ ***an Appellate Division of the Superior Court***. A rehearing may be granted on petition, as provided in subdivision (b), or on the court's own motion, before the decision becomes final.

(b) [Time for filing petition] A party seeking a rehearing ***as provided in subdivision (a)*** ~~either in the Court of Appeal or in the Supreme Court~~ must serve and file a petition therefor within 15 days after the filing of the decision.

(c) [Time for filing answer] An answer may be served and filed within 23 days after the filing of the decision.

(d) [Form of petition and answer] Insofar as practicable, the petition and answer shall conform to the provisions of rule 15.

(e) [Determination of petition] An order of the Supreme Court granting a rehearing shall be signed by at least four judges assenting thereto, and filed with the clerk. If no order is made before the decision becomes final as provided in subdivision (a) of rule 24, the petition shall be deemed denied, and the clerk shall enter a notation in the register to that effect.

Comment. Technical amendments necessary to make Rule 27 apply to Appellate Divisions.

PART V. APPEALS IN CRIMINAL CASES

Rule 31. Notice of appeal

(a) [Time of filing] In the cases provided by law, an appeal is taken by filing a written notice of appeal with the clerk of the superior court within 60 days after the rendition of the judgment or the making of the order. A notice of appeal filed prior to the time prescribed therefor is premature but may, in the discretion of the reviewing court for good cause, be treated as filed immediately after the rendition of the judgment or the making of the order.

Whenever a notice of appeal is received by the clerk of the superior court after the expiration of the period prescribed for filing such notice, the clerk shall mark it

"Received (date) but not filed" and advise the party seeking to file the notice that it was received but not filed because the period for filing notice of appeal had elapsed.

If the attorney for a defendant either files a notice of appeal for the defendant or assists the defendant in filing it, the attorney shall serve a copy on the court reporter, lead reporter, or reporting supervisor, and file proof of the service; but the attorney's failure to do so does not affect the validity of the appeal. The reporter shall begin work on the transcript immediately upon being served with a copy of the notice of appeal or upon notice from the clerk, whichever is earlier.

(b) [Form of notice] If the appeal is by the defendant the notice shall be signed by him or by his attorney, and if the appeal is by the People, the notice shall be signed by the district attorney, his deputy, or other counsel for the People. The notice shall be sufficient if it states in substance that the party appeals from a specified judgment or order or a particular part thereof, and shall be liberally construed in favor of its sufficiency. The notice need not specify the court to which the appeal is taken, and, except when judgment of death was pronounced ***or the judgment was in a misdemeanor or infraction case as defined by Penal Code section 691(g)***, a notice shall be deemed to be an appeal to the Court of Appeal for the district. ***An appeal in a misdemeanor or infraction case shall be deemed to be an appeal to the Appellate Division of the Superior Court.***

(c) [Notification by clerk] The clerk of the superior court shall forthwith transmit a copy of the notice of appeal and a copy of the sequential list of reporters made pursuant to rule 980.4 to the clerk of the reviewing court and mail a notification of the filing of the notice of appeal to each party other than the appellant. The notification shall state the number and title of the case and the date the notice of appeal was filed. The failure of the clerk to mail such notice or to give such notification shall not affect the validity of the appeal.

(d) [Guilty or nolo contendere plea] If a judgment of conviction ***in a felony case*** is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files the statement the trial court shall execute and file either a certificate of probable cause or an order denying a certificate and shall forthwith notify the parties of the granting or denial of the certificate.

If the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds.

The time for preparing, certifying, and filing the record on appeal or for filing an agreed statement shall begin when the appeal becomes operative.

(e) [Receipt by mail from custodial institution] If a notice of appeal is received by mail from a custodial institution after the time within which it may be filed under subdivision (a),

(1) the envelope in which it was received shall be retained by the clerk of the trial court and made part of the case file; and

(2) if an examination of the envelope in which it was mailed clearly demonstrates that it was mailed or delivered to custodial officials for mailing within the time prescribed by subdivision (a), the notice shall be deemed timely and shall be filed, notwithstanding subdivision (a).

This subdivision is intended to enlarge the authority of the clerk to file a notice of appeal under the stated circumstances. It is not intended to limit the appeal rights of the defendant under the "prison-delivery rule," as stated in In re Jordan (1992) 4 Cal.4th 116, or under other applicable case law.

Comment. Technical amendments necessary to make Rule 31 apply to Appellate Divisions. The amendment in subdivision (d) is intended to make sure that the probable cause procedure after a guilty plea does *not* apply to misdemeanor or infraction appeals.

Rule 37. Briefs

(a) [Time and service] The appellant's opening brief shall be served and filed within 40 days after the filing of the record in the reviewing court. The respondent's brief shall be served and filed within 30 days after the filing of the appellant's opening brief. The appellant's reply brief, if any, shall be served and filed within 20 days after filing of the respondent's brief. The time for filing a brief in a criminal case shall not be extended by stipulation of the parties. Every brief of the defendant shall be served on ~~**both**~~ the district attorney and ***, in felony cases, on*** the Attorney General and, unless the defendant has expressly requested otherwise in writing, a copy shall be sent to the defendant. Counsel's signed statement that a copy of the brief was sent to the defendant or that counsel has the defendant's written request that briefs not be sent to the defendant is adequate proof thereof, the defendant's address need not be given in the statement. The People shall serve two copies of their briefs on appellate defense counsel, if appointed. All briefs shall be served on the clerk of the superior court for delivery to the judge who presided at the trial, as provided in rule 16(b).

(b) [Form] Briefs may be typewritten or proportionally spaced, as each is defined in rule 15, and shall conform, as far as practicable, to the rules governing briefs on appeal in civil cases.

(c) [Length] A brief or petition for rehearing in an appeal from a judgment of death, whether typewritten or proportionally spaced, may not exceed the following limits:

(1) Appellant's opening brief--280 pages

(2) Respondent's brief--280 pages

(3) Reply brief--140 pages

(4) Petition for rehearing--70 pages

Tables and indices shall not be counted as pages for purposes of determining page limits. The Chief Justice may for good cause permit a longer brief to be filed.

A brief or petition for rehearing in an appeal in any other ~~**criminal**~~ ***felony*** case may not exceed 75 pages, excluding tables and indices, unless a longer brief is permitted by the presiding justice for good cause.

(d) [Applicability of 1996 amendments] The amendments to this rule effective July 1, 1996, apply to cases in which the appellant's opening brief is filed on or after January 1, 1997.

Comment. Rule 37(a) is amended so that briefs in misdemeanors and infractions are not served on the Attorney General. Rule 37(c) is amended so that the page limit for rehearings does not apply to misdemeanors and infractions.

PART VI. GENERAL PROVISIONS

Rule 40. Definitions

In these rules, unless the context or subject matter otherwise requires:

(a) The past, present and future tenses shall each include the other; the masculine, feminine and neuter gender shall each include the other; and the singular and plural number shall each include the other.

(b) The words "superior court" mean the court from which an appeal is taken pursuant to these rules; the words "reviewing court" apply to the court in which an appeal or original proceeding is pending, and mean the Supreme Court ***,*** ~~**or**~~ the Court of Appeal ***, or an Appellate Division of the Superior Court*** to which an appeal is taken, or to which an appeal or an original proceeding is transferred, or in which an original proceeding is commenced.

(c) The party appealing is known as the "appellant," and the adverse party as the "respondent."

(d) The word "shall" is mandatory and the word "may" is permissive.

(e) The terms "party," "appellant," "respondent," "petitioner" or other designation of a party include such party's attorney of record. Whenever under these rules a notice is required to be given to or served on a party such notice or service shall be made on his attorney of record, if he has one.

(f) The words "serve and file" mean that a document filed in a court is to be accompanied by proof of prior service, in a manner permitted by law, of one copy of the document on counsel for each party who is represented by separate counsel and on each party appearing in person. The proof of service shall name each party represented by each attorney served.

(g) "Judgment" includes any judgment, order or decree from which an appeal lies.

(h) The words "Chief Justice" include the acting Chief Justice, ~~**and**~~ the words "Presiding Justice" include the acting Presiding Justice ***, and the words "Presiding Judge" include the acting Presiding Judge***.

(i) The terms "written," "writing," "typewriting," and "typewritten" include other methods of duplication equivalent in legibility to typewriting. When applied to briefs, "typewritten" has the meaning stated in rule 15 and includes originals produced by letter-quality word-processing equipment, by photocomposition equipment, and by other means producing characters of equal clarity and similar typeface with a uniform 10 characters

per inch, but excludes originals produced by a dot-matrix process that generates fewer than 300 dots per inch horizontally and vertically.

(j) Rule and subdivision headings do not in any manner affect the scope, meaning or intent of the provisions of these rules.

(k) The word "briefs" includes petitions for rehearing, petitions for review, and answers thereto. It does not include petitions for extraordinary relief in original proceedings.

(l) The terms "other duplication process" and "other process of duplication" mean any reproduction of a typewritten original (except typewriter ribbon and carbon copies) or of a "proportionally spaced" original which produces a clear black-on-white image equally legible to a ribbon copy of typewriting with a well-inked ribbon.

(m) "Register" and "register of actions" means the permanent record of cases maintained by electronic, magnetic, microphotographic, or similar means.

(n) "Date of filing" of a brief (as defined in subdivision (k)) is the date of delivery to the clerk's office during normal business hours. The brief is timely, however, if the time for its filing had not expired on the date of its mailing by certified or express mail as shown on the postal receipt or postmark, or the date of its delivery to a common carrier promising overnight delivery as shown on the carrier's receipt.

(o) The word "recycled" as applied to paper means "recycled paper product" as defined by section 42202 of the Public Resources Code. Whenever the use of recycled paper is required by these rules, the attorney, party, or other person filing or serving a document certifies, by the act of filing or service, that the document was produced on paper purchased as recycled paper as defined by that section.

Comment. Technical amendments to Rule 40 so that its definitions apply to the Appellate Division.

Rule 43. Applications on routine matters

Except as otherwise provided in these rules, applications to extend time for filing records and briefs, applications to shorten time, and applications relating to other matters of routine shall be served and filed, but the Chief Justice **, ~~or~~** presiding justice ***, or presiding judge*** may require an additional showing to be made and for good cause may excuse advance service. The application shall set forth facts showing: (1) good cause for granting the application, and (2) any previous applications granted or denied to any party after filing of the notice of appeal. The application may be granted or denied by the Chief Justice **, ~~or~~** presiding justice, ***or presiding judge,*** unless the court otherwise determines. The applicant shall provide to the clerk addressed, sufficient postage prepaid envelopes for mailing the order granting or denying the application to all parties.

Comment. Technical amendments so that Rule 43 applies to Appellate Divisions.

Rule 44. Form and filing of papers

(a) [Form] Except as otherwise provided in these rules, all papers filed in a reviewing court may be either typewritten or proportionally spaced at the option of the party filing them. If typewritten, they shall conform, as far as practicable, to the requirements of subdivision (c) of rule 15. If proportionally spaced, they shall conform,

as far as practicable, to the requirements of subdivision (d) of rule 15. All copies of papers must be clear and legible. The use of recycled paper shall be required for all papers filed with the court or served on the parties. The use of recycled paper for the cover of the brief is encouraged.

(b) [Number of copies] If a brief, paper, or document, other than the record, is filed in a reviewing court the following number of copies shall be filed:

(1) If filed in the Supreme Court:

(i) An original and 13 copies of a petition for review or other petition, or an answer, opposition, or other response to a petition.

(ii) An original and 14 copies of a brief in a cause pending in that court.

(iii) An original and 8 copies of a notice of motion, motion, or opposition or other response to a motion.

(iv) An original and one copy of any other document or paper.

(2) If filed in a Court of Appeal:

(i) An original and 4 copies of a petition or an answer, opposition, or other response to a petition.

(ii) An original and 4 copies of a brief and, in civil appeals, proof of delivery of 5 copies to the Supreme Court.

(iii) An original and 3 copies of a notice of motion, motion, or opposition or other response to a motion.

(iv) An original and one copy of any other document or paper.

(3) If filed in an Appellate Division of the Superior Court:

(i) An original and 4 copies of a petition or an answer, opposition, or other response to a petition.

(ii) An original and 4 copies of a brief.

(iii) An original and 3 copies of a notice of motion, motion, or opposition or other response to a motion.

(iv) An original and one copy of any other document or paper.

(c) [Covers] So far as practicable, the covers of briefs and petitions should be in the following colors:

Appellant's opening brief (rule 16(a))	green
Respondent's brief (rule 16(a))	yellow
Appellant's reply brief (rule 16(a))	tan
Amicus curiae brief	gray
Petition for rehearing	orange
Answers to petition for rehearing	blue
Petition for original writ or answer (opposition) to writ petition	red
Petition for review (rule 28(b))	white
Answer to petition for review (rule 28(c))	blue
Reply to answer (rule 28(d))	white
Petitioner's brief on the merits (rule 29.3(a))	white
Answer brief on the merits (rule 29.3(a))	blue
Reply brief on the merits	white

A brief or petition not conforming to this subdivision shall be accepted for filing; but in case of repeated violations by an attorney or party, the court may proceed as provided in rule 18.

(d) [Attorneys' names, addresses, telephone numbers, State Bar numbers] Every brief and other paper filed in a reviewing court shall contain on the cover, or on the first page if there is no cover, the name, address, and telephone number of the attorney filing the paper, and the California State Bar membership number of that attorney and of every attorney who joins in the brief or paper. California State Bar membership numbers of the supervisors in a law firm or public law office of the attorney responsible for the case need not be stated.

Until July 1, 1994, a brief or other paper shall not be rejected for filing because the attorney's California State Bar membership number is missing, but it may be stricken if the attorney does not furnish the number promptly upon request by the clerk.

Comment. Technical amendments so that Rule 44 applies to Appellate Divisions. Subdivision (b)(3) is similar to (b)(2) but does not require filing of briefs with the Supreme Court of California.

Rule 45. Extension and shortening of time

(a) [Computation of time] The time for doing any act required or permitted under these rules shall be computed and extended in the manner provided by the Code of Civil Procedure.

(b) [Extension by superior court prohibited] Judges of the superior court shall not extend the time for doing any act involved in the preparation of the record on appeal. Those times may be extended as provided in subdivision (c).

(c) [Extension of time] The time for filing a notice of appeal, filing a petition for Supreme Court review of a Court of Appeal decision or the granting or denial of a rehearing in the Court of Appeal ***or in an Appellate Division of the Superior Court*** shall not be extended. The time for the granting or denial of Supreme Court review of a decision of a Court of Appeal shall only be extended as provided in subdivision (a) of rule 28. The time for the granting or denial of a rehearing in the Supreme Court shall only be extended as provided in subdivision (a) of rule 24. The time for ordering a case transferred from the ~~superior court~~ ***Appellate Division of the Superior Court*** to the Court of Appeal as provided in rule 62 shall not be extended, and the time for ~~a superior court~~ ***an Appellate Division of the Superior Court*** to certify the transfer of a case to the Court of Appeal shall not be extended except as provided in subdivision (d) of rule 63. The Chief Justice **,** ~~or~~ presiding justice, ***or presiding judge,*** for good cause shown, may extend the time for doing any other act required or permitted under these rules. The Chief Justice **,** ~~or~~ presiding justice **,** ***or presiding judge*** may relieve a party from a default for failure to file a timely petition for review or rehearing if the time within which the court could order review or rehearing on its own motion has not expired. An application for extension of time shall be made as provided in rule 43.

(d) [Shortening time] The Chief Justice **,** ~~or~~ Presiding Justice, ***or Presiding Judge,*** for good cause shown, may shorten the time for serving or filing a notice of

motion or other paper incident to an appeal or an original proceeding in the reviewing court. An application to shorten time shall be made as provided in rule 43.

(e) [Relief from default] The reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal. This rule is applicable to any order granting relief from default made after January 1, 1962. ***The presiding judge of an Appellate Division of the Superior Court may relieve a party from a default as provided in this subdivision.***

(f) [Notification to client] Counsel in civil cases shall mail or otherwise deliver to the party represented a copy of each stipulation or application for additional time for a step in the preparation of the record or for filing briefs, and affix evidence of doing so to the application or stipulation. In class actions, delivering a copy to one represented party is adequate. The evidence of mailing or other delivery need not state the address of the party to whom copies were sent.

Comment. Technical amendments so that Rule 45 applies to Appellate Divisions.

Rule 45.5. Standards for time extensions

(a) [Policy on time extensions] The policy of this state is that the times provided by the rules of court should generally be met so that appellate business is conducted expeditiously and public confidence in efficient administration of justice at the appellate level is maintained. California's policy is also that litigants are entitled to have the effective assistance of counsel, and that adequate time must be allowed for counsel to properly represent their clients.

It is recognized that, for a variety of legitimate reasons, counsel may not always be able to prepare briefs or other documents within normal rule times. Preparing briefs or other documents which fully advance the parties' interests, and are accurate, clear, concise, and complete so they assist the courts, requires adequate time. When good cause appears, an extension of time shall therefore be granted.

As a means of balancing these competing policies, applications to extend time in the Supreme Court **,** ~~and~~ Courts of Appeal ***, and Appellate Divisions of Superior Courts*** shall demonstrate good cause pursuant to the standards stated in this rule.

(b) [Declaration stating facts] An application to extend time shall be made by a declaration containing specific facts, not mere conclusions, and shall be served on all parties to the appellate proceeding. The application shall state when the document is due, how long an extension is requested, and whether any prior extensions have been granted and, if so, their length, and whether granted by stipulation or by the court.

(c) [Factors considered] In determining good cause, the court shall consider the following factors, if applicable:

(1) The degree of prejudice, if any, to any party, including a description of the judgment or order from which appeal is taken, in sufficient detail to enable the court to determine whether there would be significant prejudice to any litigant from grant or denial of extension.

(2) In civil cases, the position of the client and any opponent concerning the extension being sought.

(3) The number and complexity of the issues raised, including a description of those issues, and the length of the record, which must be described, including the number of relevant trial exhibits. A record containing one volume of clerk's transcript and two volumes of reporter's transcripts is considered an average-length record.

(4) Settlement negotiations, including how far they have progressed and when they will be completed.

(5) Whether the case in which the application is made involves litigation entitled to priority.

(6) Whether counsel handling the appeal is new to the case, or the necessity for other counsel or the client to review the document to be filed.

(7) Whether the counsel responsible for preparing the document has other time-limited commitments during the affected period. Mere conclusory statements that more time is needed because of the press of other business will not suffice. Good cause may be established by a specific showing of other obligations (i) involving deadlines which as a practical matter preclude filing the document by the due date without impairing quality, or (ii) which are in cases entitled to priority.

(8) Illness of counsel, a personal emergency, or a planned vacation which cannot reasonably be rearranged and which was not reasonably expected to conflict with the due date.

(9) Any other factor which in the context of a particular case constitutes good cause.

Comment. Technical amendments so that Rule 45.5 applies to Appellate Divisions.

Rule 47. Courts of Appeal with more than one division

(a) [Assignment of appealed cases] Appeals taken directly to a Court of Appeal having more than one division, or transferred to such a court by orders which do not designate the division to which they are transferred, may, on such transfer or on receipt of a copy of the notice of appeal or other notification of its filing, be assigned to the divisions of the court in a manner that will equalize the distribution of business among them. These assignments shall be made by the presiding justices successively for periods of one year unless a majority of the judges of the court in the district shall otherwise determine.

(b) [Assignment of original proceedings, certifications for transfer, motions and applications] Original proceedings, certifications for transfer of cases on appeal within the ~~original~~ jurisdiction of ***the Appellate Division of the Superior Court*** ~~municipal or justice courts~~, and motions and applications relating to causes not yet assigned to a particular division of such a court, shall be assigned as a majority of the judges of the court in the district shall determine.

(c) [Clerk's records] The clerk of each Court of Appeal having more than one division shall keep records showing the divisions in which causes and proceedings are pending.

Comment. Technical amendments so that Rule 47 applies to Appellate Divisions.

Rule 53. Scope and construction of rules

These rules shall apply to appeals from superior courts ***, except in small claims cases,*** and to original proceedings, motions, applications and petitions in the Supreme Court ***,*** ~~and~~ Courts of Appeal ***, and Appellate Divisions of the Superior Court***. These rules shall also apply to the transfer and review of cases on appeal within the ~~original~~ jurisdiction of ***the Appellate Division of the Superior Court*** ~~municipal or justice courts~~ unless inconsistent with Rules 61 to 69, and for the purpose of such application an appeal under these rules includes such a transfer. The rules shall be liberally construed to secure the just and speedy determination of appeals, transfers, and original proceedings.

Comment. Technical amendments so that Rule 53 applies to Appellate Divisions.

Rule 55. Preservation and destruction of records in Court of Appeal; minutes

(a) [Form in which records may be preserved] Appellate court records may be preserved in any form of communication or representation, including optical, electronic, magnetic, micrographic, or photographic media or other technology capable of accurately producing or reproducing the original record according to minimum standards or guidelines for the preservation and reproduction of the medium adopted by the American National Standards Institute or the Association for Information and Image Management. If records are preserved in a form other than paper, the provisions of Government Code section 68150, subdivisions (b) through (d) and (f) (not including subdivision (f)(1)) through (h), shall apply.

(b) [Preservation and destruction of records] The clerk of a Court of Appeal ***and of an Appellate Division of the Superior Court*** shall keep as the permanent records of the court the minutes of the court and a register of appeals and original proceedings. The clerk shall preserve all other records of cases for 10 years after the decisions in the cases become final, and then the records may be destroyed as ordered by the administrative presiding justice, or the presiding justice in a Court of Appeal having only one division ***, or by the presiding judge of an Appellate Division of the Superior Court***; except that in any criminal case in which the court affirms a judgment of conviction, the original reporter's transcript shall be retained for 20 years after the decision becomes final.

(c) [Content of minutes] The minutes of a Court of Appeal ***and an Appellate Division of the Superior Court*** shall record the significant public acts of the court and make it feasible for the public to follow the major eventsin the history of cases coming before the court. The minutes, therefore, shall include the following:

(1) Reference to opinions filed, showing whether each was published.

(2) Reference to orders granting rehearings, or modifying opinions, or denying rehearings.

(3) Reference to orders addressing the publication status of an opinion if issued after the opinion was filed.

(4) Summaries of all courtroom proceedings showing, at a minimum, the cases called for argument, the judges hearing argument in a division having more than three judges, and for each case the names of the attorneys who presented argument for each

party and whether the cause was submitted at the close of argument or further briefing was requested.

(5) Orders vacating submission of causes, giving the reason for doing so and the date of resubmission.

(6) Orders correcting clerical and similar errors in published opinions, not requiring modification of the opinion.

(7) Orders dismissing appeals on motion or on the court's own motion for want of jurisdiction, unless the lack of jurisdiction is patent and uncontested.

(8) Orders consolidating cases.

(9) Orders affecting the judgment or its date of finality.

(10) Orders changing or correcting any of the above.

The minutes may at the direction of the court include other matter, such as the following:

(11) Assignments of judges by the Chief Justice.

(12) Reports of the Commission on Judicial Appointments confirming judges.

(13) Memorials.

Comment. Technical amendments so that Rule 45 applies to Appellate Divisions.

CHAPTER II. RULES ON ORIGINAL PROCEEDINGS IN REVIEWING COURTS

CHAPTER III. RULES ON TRANSFER OF ~~MUNICIPAL AND JUSTICE COURT~~ *APPELLATE DIVISION* APPEALS

Rule 61. Definitions

In rules 61 to 69, inclusive, relating to transfer of cases on appeal within the ~~original~~ jurisdiction of ~~municipal and justice courts~~ ***an Appellate Division of the Superior Court***, unless the context or subject matter otherwise requires:

(a) "Case" means any case on appeal within the ~~original~~ jurisdiction of ~~a municipal or justice court~~ **an Appellate Division of the Superior Court**.

(b) "Trial" includes trial anew pursuant to section 117.10 of the Code of Civil Procedure, trial in the superior court pursuant to section 1469 of the Penal Code, and a new trial.

(c) When a case has been tried in the superior court, "judgment" includes any order from which an appeal could be taken if the case were within the original jurisdiction of the superior court.

(d) "Court of Appeal," "Presiding Justice," and "clerk of the Court of Appeal" shall, if a case is transferred to the Supreme Court, mean "Supreme Court," "Chief Justice," and "clerk of the Supreme Court," respectively.

Comment. Technical amendments so that Rule 61 applies to Appellate Divisions.

Rule 62. Transfer

(a) [Cases transferable] A Court of Appeal may order a case transferred to it for hearing and decision when the ~~superior court~~ ***Appellate Division of the Superior Court***

certifies or the Court of Appeal on its own motion determines from an opinion of the ~~appellate department~~ ***Appellate Division*** published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

(b) [Time] A transfer on certification may be ordered within 20 days after the record on transfer is filed in the Court of Appeal unless the proceedings for transfer are previously dismissed pursuant to subdivision (a) of rule 64. A transfer on the Court of Appeal's own motion, as provided in subdivision (a), may be ordered within 20 days after the receipt by the Court of Appeal of the opinion of the appellate department of the superior court bearing the notation that it is to be published.

(c) [Order] The order granting or denying a transfer to a Court of Appeal shall be filed with the clerk of the Court of Appeal, and if no order is made within the time specified in this rule, the transfer shall be deemed denied and the clerk shall enter a notation in the register to that effect.

(d) [Oral argument] Unless oral argument is waived, the case shall be placed on the calendar when the transfer is ordered.

(e) [Notice of order] As soon as an order of transfer is filed, the clerk shall transmit a certified copy thereof to the clerk of the superior court and shall mail to each party, and to the Attorney General in a criminal case, a notice stating that such order has been filed, the date of oral argument, and when briefs are permitted, the time for filing briefs as provided in rule 65. Upon denial of a transfer on certification, the clerk shall return the record on transfer and any exhibits to the clerk of the superior court and shall mail notice of the denial to each party and, in a criminal case, also to the Attorney General. Failure of the clerk to mail any such notice shall not affect the jurisdiction of the Court of Appeal.

Comment. Technical amendments so that Rule 62 applies to Appellate Divisions.

Rule 63. Certification

(a) [Authority to make] The ~~superior court~~ ***Appellate Division of the Superior Court*** on application of a party or on its own motion may certify that the transfer of a case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. The certification may be made by a majority of the judges of the ~~appellate department~~ ***Appellate Division***. When there was a trial in the superior court, the judge who tried the case may make the certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court.

(b) [Application for certification] Any party may apply to the superior court for the certification of a case after judgment in that court. If there was no trial in the superior court such application shall be served and filed before the judgment on appeal becomes final as to that court and may be included in any petition for rehearing. If there

was a trial in the superior court the application shall be served and filed at least 10 days before expiration of the time for certification. Any other party may serve and file an opposition within five days after the filing of the application. No hearing shall be held on the application and the failure of the court to certify the case shall be deemed a denial of the application.

(c) [Time] The certification of a case in which there is no trial in the superior court shall be filed with the clerk of that court at any time after the record on appeal and the briefs, if any, are filed in the superior court and not later than 10 days after the judgment on appeal becomes final as to that court. The certification of a case in which there was a trial in the superior court shall be filed within 30 days after entry of the judgment or 15 days after service of written notice of entry of the judgment, whichever is earlier, in a civil case, or within 15 days after rendition of the judgment in a criminal case, unless the time is extended as provided in subdivision (d) of this rule.

(d) [Extension of time] The time for filing the certification of a case shall be extended by new trial proceedings or proceedings to vacate a judgment in the same manner, to the same extent, and for the same period as the time for filing notice of appeal is extended by such proceedings pursuant to rule 3 of the Rules on Appeal.

(e) [Contents] The certification shall contain a brief statement setting forth any conflict of decision (with citation of or reference to decisions creating the conflict, if there is no written opinion by the superior court) or important question of law to be settled and shall state whether there was a judgment in the superior court, and, if so, the nature and the date thereof.

(f) [Transmission] Upon the filing of the certification the clerk of the superior court shall forthwith transmit a certified copy thereof to the clerk of the Court of Appeal and shall mail notice of such certification to each of the parties and also to the Attorney General in a criminal case.

Comment. Technical amendments so that Rule 63 applies to Appellate Divisions.

Rule 64. Transfer After Appeal to Wrong Court [added]

If an appeal is taken to the Court of Appeal in a cause over which only the appellate division of the superior court has jurisdiction, or if an appeal is taken to the appellate division of the superior court in a cause over which only the Court of Appeal has jurisdiction, the court to which the appeal has been taken may order that the appeal be transferred to the court which has appellate jurisdiction. The clerk of the court from which the cause is transferred shall immediately transmit to the proper court the original record, briefs and all original papers and exhibits on file in the cause. The order transferring the appeal may direct the appellant to pay the clerk of the court to which the cause is transferred the fee required by law for the filing of the record in the first instance. If it is so ordered and the appellant fails to pay the fee within 20 days after the mailing of the notice by the clerk that the record has been transmitted and that the filing fee must be paid, the appeal may be dismissed.

The clerk of the court to which the cause is transferred shall promptly send each party a copy of the order of transfer showing the new case number.

Comment. This rule, which is adapted from Rule 20, permits the transfer of an appeal between the Court of Appeal and the appellate division of the superior court when the appellant has taken the appeal to the wrong court.

Rule 66. When judgments of superior court on appeal become final

~~Every judgment of the appellate department of a superior court shall become final as to that court as provided in rule 107 of the rules adopted by the Judicial Council for the appellate departments of the superior court.~~

Comment. The subject matter of this rule is now covered by Rule 24.

Rule 67. Stay of proceedings

Upon the timely filing of a certification by the ~~superior court~~ ***Appellate Division of the Superior Court*** or an order of transfer on the Court of Appeal's own motion, further action, other than the preparation and transmission of the record, by the superior court in the case shall be stayed until the termination of such proceedings.

Comment. Technical amendments so that Rule 67 applies to Appellate Divisions.

CHAPTER IV. ADMINISTRATIVE PROVISIONS GOVERNING REVIEWING COURTS

Rule 76.5. Appointment of counsel in criminal appeals

(a) [Procedures] Each appellate court shall adopt procedures for appointment of counsel in criminal cases for indigent appellants who are not represented by the State Public Defender. The procedures shall require each attorney to complete a questionnaire showing the date of admission to the bar and the attorney's qualifications and experience.

(b) [Lists of qualified attorneys] On receiving each completed questionnaire, the court shall evaluate the attorney's qualifications to represent appellants in criminal cases, and then place the attorney's name on one or more lists to receive appointments to cases for which he or she is qualified. Each Court of Appeal shall maintain at least two lists, to match the attorney's qualifications to the demands of the case. In establishing the lists, the court shall consider the guidelines in section 20 of the Standards of Judicial Administration, except as provided in subdivision (d).

(c) [Evaluation] The court shall review and evaluate the performance of appointed counsel to determine whether counsel's name should remain on the same appointment list, be placed on a different list, or be deleted.

(d) [Contracts for performance of administrative functions] The court may contract with an administrator having substantial experience in handling criminal appeals to perform the functions specified in this rule. The guidelines in section 20 of the Standards of Judicial Administration need not be applied if the contract provides for a qualified attorney to consult with and assist appointed counsel concerning the issues on appeal and appellant's opening brief. The court shall provide the administrator with information needed for the performance of the administrator's duties, and, if the administrator is to perform the review and evaluation functions specified in subdivision

(c), the court shall notify the administrator of superior or substandard performance by appointed counsel.

(e) [Appointed Counsel in the Appellate Division] *In cases within the jurisdiction of the Appellate Division of the Superior Court, the following applies:*

(1) ***[Standards for appointment]*** *On application of defendant-appellant, the appellate department shall appoint counsel on appeal for any defendant- appellant convicted of a misdemeanor who is subject to incarceration or a fine of more than $500 (including penalty and other assessments), or who is likely to suffer significant adverse collateral consequences as a result of the conviction, if the defendant-appellant was represented by appointed counsel in the trial court. On application, the appellate department shall appoint counsel for any other such defendant-appellants who establish their indigency as in the Courts of Appeal. A defendant is subject to incarceration or a fine if the incarceration or fine is in a sentence, or is a condition of probation, or may be ordered if the defendant violates probation. The appellate department may appoint counsel for any other indigent defendant-appellant.*

(2) [Application; duty of trial counsel] If defense trial counsel believes that the client is indigent and will file an appeal, counsel shall prepare and file in the trial court an application to the appellate department for appointment of counsel. If the defendant-appellant was represented by appointed counsel in the trial court, the application shall include counsel's declaration to that effect. If the defendant-appellant was not represented by appointed counsel in the trial court, the application shall include a declaration of indigency supported by evidence in the form required by the Court of Appeal for the district where the court is located. The trial court shall transmit the application to the appellate department along with the record on appeal. A defendant-appellant may, however, apply directly to the appellate department for appointment of counsel at any time after the notice of appeal is filed.

The appellate department may take a reasonable time to confirm that the defendant-appellant still seeks the appointment of counsel. In the case of a defendant-appellant not represented by appointed counsel in the trial court, the appellate department may take a reasonable time to confirm the facts stated in the declaration of indigency.

(3) [Defendant found able to pay in trial court] If a defendant was represented by appointed counsel in the trial court and was found able to pay all or part of the cost of the trial counsel in proceedings under Penal Code section 987.8 or 987.81, the findings in those proceedings shall be included in the record of any appeal by the defendant or, if made after the record on appeal is transmitted to the appellate department, shall be transmitted to the appellate department as an augmentation of the record. In those cases, the appellate department shall conduct appropriate proceedings to determine the defendant's ability to pay or contribute to the expense of counsel on appeal; and if it finds that the defendant is able, shall order the defendant to pay all or part of the cost.

Comment. New subdivision (e) is taken from Rule 185.5 which is recommended for repeal.

Rule 78. Notification of failure to perform judicial duties

The Chief Justice ***,*** ~~**or**~~ presiding justice ***, or presiding judge*** of a reviewing court, or the administrative presiding justice with regard to a presiding justice, shall notify the Commission on Judicial Performance of (1) a reviewing court judge's substantial failure to perform judicial duties, including but not limited to any habitual neglect of duty, or (2) any absences caused by disability totaling more than 90 court days in a 12-month period, excluding absences for authorized vacations and attendance at schools, conferences, and workshops for judges.

The Chief Justice ***,*** ~~**or**~~ presiding justice ***, presiding judge,*** or administrative presiding justice shall give the judge a copy of any notification to the commission.

Comment. Technical amendments so that Rule 78 applies to Appellate Divisions.

Rule 80. Local rules of courts of appeal

(a) A brief, petition, motion, or other document prepared in accordance with these rules shall be accepted for filing notwithstanding any local Court of Appeal ***or Appellate Division of the Superior Court*** rule imposing other requirements.

(b) A Court of Appeal ***and Appellate Division of the Superior Court*** shall submit to the Reporter of Decisions, for publication in the advance sheets to the Official Reports, any local rule of court adopted after the effective date of this rule.

(c) A local rule of a Court of Appeal ***or Appellate Division of the Superior Court*** shall not become operative prior to 45 days after the date shown on the face of the advance sheet to the Official Reports in which it is first published.

(d) As used in this rule, "publication in the advance sheets to the Official Reports" means publication in the same manner and typeface as amendments to the California Rules of Court and does not include publication in the minutes section of an advance sheet.

Comment. Technical amendments so that Rule 80 applies to Appellate Divisions.

~~DIVISION II. RULES ON APPEAL TO THE SUPERIOR OR UNIFIED SUPERIOR COURT~~

Rule 100. Appellate rules [repealed]

~~All references in the California Rules of Court to "appellate department" mean "appellate division." Rules that apply to an appeal taken from a municipal court judgment to the appellate division of the superior court apply to an appeal taken from a unified superior court (trial court) judgment to the appellate division of the unified superior court (reviewing court).~~

Comment. This rule is no longer necessary in light of other amendments and the unification of trial courts.

Rule ~~100.5~~ *100*. Appellate division assignments

(a) [Goal] The Chief Justice, in making appointments to the appellate division of the superior court, will consider the goal of promoting the independence and the quality of the appellate division.

(b) [Factors Considered] Factors to be used in making the appointments may include:

(1) length of service as a judge;

(2) reputation within the judicial community;

(3) degree of separateness of the appellate division work from the judge=s regular assignments; and

(4) any recommendation of the presiding judge *of the superior court and the administrative presiding justice of the district*.

(c) [Judges Assigned] Judges assigned may include judges from another county; judges retired from the superior or unified court, or court of higher jurisdiction; or a panel of judges from different superior or unified courts who sit in turn in each of those superior or unified courts.

(d) [Terms of Service] In specifying terms of service to the appellate division, the Chief Justice will consider the needs of the court.

Comment. This rule is amended to reflect the recommendation of the Appellate Division Task Force regarding the creation of district-wide Appellate Divisions. Pursuant to that recommendation, the Chief Justice may consider the recommendations, if any, of the administrative presiding justices in appointing judges to appellate divisions within a district.

In light of the first clause of subdivision (c), it is not necessary to add any specific language authorizing the Chief Justice to cross-assign judges to the appellate division of the superior courts within a district in order to establish a district-wide appellate division. The first clause of subdivision (c) gives the Chief Justice adequate flexibility in making appointments to implement the Task Force's general recommendation.

Rule 101. Sessions [repealed]

~~The appellate department of a superior court shall hold one or more regular sessions each month at a time or times and at a place to be determined by the judges of the department by order entered in the minutes. The department may hold sessions at any other time and place found necessary or convenient.~~

Comment. The subject matter of this rule is now covered by Rule 22.

Rule 102. Powers of presiding judge

The presiding judge of the ~~appellate department~~ ***Appellate Division of the Superior Court*** may convene the court at any time and shall supervise the business of the ~~department~~ ***Appellate Division***. ~~Except as otherwise provided in these rules, applications to extend time for filing briefs, applications to extend or shorten time for opposing a motion, and applications relating to other matters of routine shall be served and filed; but the presiding judge of the reviewing court may require an additional showing to be made and for good cause may excuse advance service. The application may be granted or denied by the presiding judge, unless the court otherwise determines.~~

In the absence of the presiding judge, the regular judge of the ~~department~~ ***Appellate Division*** among those present who is senior in service thereon shall act as presiding judge, and in the case of equal seniority then the judge who is also senior in service in the superior court shall act as presiding judge. The words "presiding judge," wherever used in these rules, include the acting presiding judge.

Comment. Technical amendments to reflect passage of Proposition 220. The power to extend time is now covered by Rule 43.

Rule 103. Calendars and notice of hearing

~~(a) [Calendar] The clerk of the court, unless otherwise ordered, shall place upon the calendar for hearing at each regular session all appeals of which such department has jurisdiction, wherein the records on appeal were filed not less than 50 days prior to the date of the session. Any appeal may, by order of the presiding judge or the department, be placed on the calendar for hearing at any session of the department.~~

~~(b) [Notice of hearing] As soon as the record on appeal in any case is filed, the clerk shall mail to the attorney appearing of record for each party, or if any party has appeared without attorney, then to such party personally, at the address of such attorney, or party appearing in the record, a notice stating that said record has been filed and giving the date at which the appeal will be heard and the dates when each party must file briefs, as provided in these rules. Failure of the clerk to mail any such notice shall not affect the jurisdiction of the appellate department.~~

Comment. The subject matter of this rule is now covered in Rule 22.

Rule 104. Motions [repealed]

~~(a) [Motions and opposition] Except as otherwise provided in these rules all motions in the reviewing court shall be made by the filing of a typewritten motion, with proof of service on all other parties, stating the grounds of the motion, the papers, if any, on which it is based, and the order or other relief requested. Each copy of the motion shall be accompanied by a memorandum of points and authorities, and if the motion is based on matters not appearing of record by affidavits or other evidence in support thereof. Any showing in opposition to the motion shall be served and filed within 7 days after the filing of the motion.~~

~~(b) [Disposition of motion] Motions may be disposed of after opposition has been filed or the time for filing opposition has expired. The reviewing court may place any motion on the calendar for hearing or may otherwise dispose of the motion as it may determine. When a motion has been placed on the calendar for hearing, the clerk shall mail to each party a notice showing the date and time designated for the hearing.~~

Comment. The subject matter of this rule is now covered by Rule 41. The time to file an opposition under Rule 41 is 10 days instead of the 7 days provided by this rule.

Rule 105. Briefs and Records [repealed]

~~(a) [Time for filing] In civil and criminal cases the appellant shall file an opening brief within 20 days after the filing of record on appeal; the respondent shall file a brief within 20 days after the filing of appellant's opening brief, and the appellant may file a reply brief within 10 days after the filing of respondent's brief, but not later than the time~~

of the hearing. Any party may join another party or other parties in a brief or may adopt by reference any brief in the same or a companion case.

(b) [Brief of amicus curiae] A brief of amicus curiae may be filed on permission first obtained from the presiding judge, subject to conditions he or she may prescribe. If the brief is in support of the position of one of the parties, that fact shall be noted in the brief's heading.

The Attorney General may file an amicus curiae brief without obtaining the presiding judge's permission, unless the Attorney General is presenting the brief on behalf of another state officer or agency; but the presiding judge may prescribe reasonable conditions for filing and answering the brief .

(c) [Contents of briefs] Each brief shall state concisely the propositions of both law and fact relied on by the party filing it, with reference (by line and page, if possible) to the parts of the record supporting such propositions of fact and citations of the authorities for such propositions of law. Each point to be made, with the argument in support thereof, shall be presented separately under an appropriate heading with subheadings if desired, showing its nature. No quotation or extract from the record or from any legal authority shall exceed 15 full lines of typewriting, and no brief shall exceed 15 pages in length except by permission of the presiding judge.

(d) [Format] All briefs shall be prepared as provided in subdivisions (b), (c), (d), and (h) of rule 15, except that such briefs shall be bound at the top.

(e) [Service and filing] Every brief shall, before filing, be served by the party filing it on each adverse party who has appeared separately, and every brief of amicus curiae shall, before filing, be served on all parties to the appeal. The original brief, with proof of service thereof, shall be filed with the clerk. The clerk shall not file any brief which does not conform to these rules or which is tendered to him for filing after the time fixed by these rules or by any order extending or fixing the time therefor, unless by order of the presiding judge. The presiding judge may make such order, in his discretion, where theinfraction of the rules is of minor character and will not affect the rights of the parties or seriously hamper the court in its examination of the appeal. Service in unfair competition cases under Business and Professions Code section 17209 must also comply with rule 16(d).

(f) [Copy for trial judge] No brief shall be filed without proof of the deposit of one copy with the clerk of the trial court for delivery to the judge who presided at the trial of the case. The clerk shall deliver the brief to the judge and need not maintain a copy in the court file.

(g) [Use of recycled paper for records on appeal from limited civil cases and for briefs filed in the appellate divisions] The use of recycled paper is required for the original record on appeal from a limited civil case and for any brief filed with the court in a matter to be heard in the appellate division. The use of recycled paper is required for all copies of these documents filed with the court or served on other parties.

(h) [Unfair competition cases] In an unfair competition proceeding under Business and Professions Code section 17200 et seq., each brief and each petition shall contain the following statement on the front cover: "Unfair competition case. (See Bus. & Prof. Code, ' 17209 and Cal. Rules of Court, rule 16(d).)"

Comment. The subject matter of this rule is now covered by Rules 14, 15, and 16. The time for filing briefs under Rule 16 is 30 for appellant's opening, 30 for respondent's opening, and 20 for appellant's reply (as compared with 20, 20, and 10, respectively, under Rule 105).

Rule 106. Decisions [amended]

~~Each appeal shall be heard and determined or taken under submission at the session at which it was set for hearing, unless, for good cause to be entered in the minutes, it is continued for hearing to another date, or it is ordered to be submitted on briefs to be filed. The judges of the appellate department shall not be required to write opinions in any cases decided by them, but may do so whenever they deem it advisable or in the public interest.~~ If an opinion is to be published in Advance California Appellate Reports, the clerk immediately upon the judgment in the case becoming final shall transmit two copies of the opinion to the Reporter of Decisions in accordance with rule 976 and another copy bearing the notation "To be published in Advance California Appellate Reports" to the Court of Appeal for the district.

Rule 107. Rehearing and finality of judgments [repealed]

~~(a) [Time for rehearing] At any time before a judgment of an appellate department becomes final, as hereinafter provided it may vacate such judgment and order a rehearing.~~

~~(b) [When judgment becomes final] Unless a rehearing is ordered, every judgment of an appellate department shall become final as follows:~~

~~(1) Upon the expiration of 15 days after the judgment is pronounced, unless a petition for rehearing is filed within that time;~~

~~(2) If a timely petition for rehearing is filed, upon the expiration of 30 days after the judgment is pronounced or upon the denial of all such petitions, whichever is earlier.~~

~~(3) Where the judgment is modified before it becomes final, as above provided, the period specified herein begins to run anew, as of the date of modification; but a change of the opinion without modification of the judgment does not postpone the time when the judgment becomes final.~~

~~(c) [Petition, answer and determination] A petition for a rehearing shall be served on all adverse parties before filing, and filed within 15 days after the judgment is pronounced, and shall not be filed unless accompanied by proof of service. An answer to the petition may be served on the petitioning party and filed, if accompanied by proof of service, within eight days after service of the petition. If a rehearing is ordered, the appellate department may place the case on the calendar for further argument or submit it for decision.~~

~~(d) The periods of time specified in this rule shall be computed as provided in the Code of Civil Procedure, and extended in the cases and to the extent specified by section 12a of said code, but shall not be otherwise extended.~~

Comment. The subject matter of this rule is now covered by Rules 24 and 27. Under Rule 24, a decision becomes final 30 days after filing (as compared with the 15 day period provided for in Rule 107).

Rule 108. Consent to modification [repealed]

~~If the appellate department orders that a judgment be reversed and a new trial granted or that, in the alternative, the judgment be affirmed on condition that the party in whose favor judgment has been rendered consent to a remission of a portion thereof, or on condition that the party against whom the judgment has been rendered consent to an addition thereto, then, unless otherwise ordered, the judgment of reversal and granting of a new trial shall become effective unless within 15 days after the filing of the decision two copies of a written consent by such party to the remission or addition is filed in the appellate department, and becomes final as provided in rule 107. The filing of written consent is not a modification of the judgment within the meaning of rule 107. A copy of the consent shall be transmitted with the remittitur to the trial court.~~

Comment. The subject matter of this rule is now covered by Rule 24(c).

~~DIVISION II. RULES ON APPEAL TO THE SUPERIOR OR UNIFIED SUPERIOR COURT~~

~~CHAPTER II. APPEALS FROM MUNICIPAL AND JUSTICE COURTS IN CIVIL CASES~~

Rule 121. Filing notice of appeal [repealed]

~~(a) [Form of notice] An appeal in a civil case, except a small claims case, from a judgment of a municipal or justice court or from a particular part thereof is taken by filing with the clerk of that court a notice of appeal therefrom. The notice shall be signed by the appellant or by his attorney and shall be sufficient if it states in substance that the appellant appeals from a specified judgment or a particular part thereof. A notice of appeal shall be liberally construed in favor of its sufficiency.~~

~~(b) [Notification by clerk] The clerk of the trial court shall forthwith mail a notification of the filing of the notice of appeal to the attorney of record of each party other than the appellant, or if the party is not represented by an attorney, then to the party at his last known address. The notification shall state the number and title of the action or proceeding and the date the notice of appeal was filed. Such mailing is a sufficient performance of the clerk's duty notwithstanding the death of the party or the death, discharge, suspension, disbarment or disqualification of his attorney prior to the giving of the notification. The failure of the clerk to give such notification shall not affect the validity of the appeal.~~

~~(c) [Payment of filing fee in civil appeals] At the time of filing the notice of appeal or within 10 days thereafter the appellant shall pay to the clerk of the municipal or justice court the filing fee prescribed by section 26824 of the Government Code. The filing fee shall be nonrefundable.~~

~~(d) [Excuse from payment of filing fee] If the appellant is indigent, payment of the filing fee may be excused on the same basis as payment of a filing fee in the trial court is excused.~~

~~(e) [Notice of cross appeal] As used in this rule, "notice of appeal" includes notice of cross appeal, and "appellant" includes any party who files a cross appeal.~~

Comment. The subject matter of this rule is now covered by Rule 1.

Rule 122. Time of filing notice of appeal [repealed]

~~(a) [Normal time] Except as otherwise provided by statute or rule 123, a notice of appeal shall be filed on or before the earliest of the following dates: (1) 30 days after the date of mailing by the clerk of the court ofa document entitled "notice of entry" of judgment or appealable order; (2) 30 days after the date of service of a document entitled "notice of entry" of judgment or appealable order by any party upon the party filing the notice of appeal, or by the party filing the notice of appeal; or (3) 90 days after the date of entry of the judgment. For the purposes of this subdivision, a file- stamped copy of the judgment or appealable order may be used in place of the document entitled "notice of entry."~~

~~(b) [What constitutes entry] For the purposes of this rule: (1) The date of entry of a judgment shall be the date of its entry in the minute book or docket unless the entry expressly directs that a written order be prepared, signed and filed, in which case the date of entry shall be the date of filing of the signed order. (2) The date of entry of an order which is not entered in the minutes or docket shall be the date of filing of the order signed by the court.~~

~~(c) [Premature notice] A notice of appeal filed prior to entry of the judgment, but after its rendition, shall be valid and shall be deemed to have been filed immediately after entry. A notice of appeal filed prior to rendition of the judgment, but after the judge has announced his intended ruling, may, in the discretion of the reviewing court for good cause, be treated as filed immediately after entry of the judgment.~~

Comment. The subject matter of this rule is now covered by Rule 2. Under Rule 2, the time for filing is 60 days after date of mailing, 60 days after service, and 180 days after entry of judgment (compared to 30, 30 and 90, respectively, under Rule 122).

This rule provides that the date of entry is the date a judgment is entered in the "minute book or docket." Rule 2, by contrast, provides that the date of entry is the date a judgment is entered in the "judgment book." The provisions in this Rule appear to be outdated and, more importantly, contrary to C.C.P. § 668 which provides that "[e]xcept as provided in Section 668.5 [dealing with alternative methods for entering judgments], the clerk of the superior court and municipal court, must keep, with the records of the court, a book called the "judgment book," in which judgments must be entered." In light of Section 668, Rule 122's reference to judgments being entered in a "minute book or docket" is *not* being added to Rule 2. Any court that is still using a minute book or docket for entry of judgments in limited civil cases should reconsider the practice in light of Section 668.

Rule 123. Extension of time and cross-appeal [repealed]

~~(a) [New trial proceeding] When a valid notice of intention to move for a new trial is served and filed by any party within the time in which, under rule 122, a notice of appeal may be filed, and the motion is denied, the time for filing the notice of appeal from the judgment is extended for all parties until 15 days after either entry of the order denying the motion or denial thereof by operation of law, but in no event may such notice of appeal be filed later than 90 days after the date of entry of the judgment whether or not the motion for new trial has been determined.~~

~~(b) [Motion to vacate] When a valid notice of intention to move to vacate a judgment or to vacate a judgment and enter another and different judgment is served and filed by any party on any ground within the time in which, under rule 122, a notice of appeal from the judgment may be filed, or such shorter time as may be prescribed by statute, and the motion is denied or not decided by the trial court within 75 days after entry of the judgment, the time for filing the notice of appeal from the judgment is extended for all parties until 15 days after entry of the order denying the motion to vacate or until 90 days after entry of the judgment, whichever shall be less.~~

~~(c) [Cross appeal] When a timely notice of appeal is filed under subdivision (a) of rule 122 or under subdivision (a) or (b) of rule 123, any other party may file a notice of appeal within 10 days after mailing of notification by the trial court clerk of such first appeal or within the time otherwise prescribed by the applicable subdivision, whichever period last expires. If a timely notice of appeal is filed from an order granting a motion for a new trial or granting, within 75 days after entry of judgment, a motion to vacate the judgment or to vacate judgment and enter another and different judgment, any party other than the appellant, within 10 days after mailing of notification by the trial court clerk of such appeal, may file a notice of appeal from the judgment or from an order denying a motion for judgment notwithstanding the verdict, and on that appeal may present any question which he might have presented on an appeal from the judgment as originally entered or from the order denying a motion for judgment notwithstanding the verdict.~~

~~(d) [Notification of cross appeal] On the filing by a party of a notice of cross appeal, the trial court clerk shall mail a notification thereof as provided in subdivision (b) of rule 121.~~

Comment. The subject matter of this rule is now covered by Rule 3. All of the time periods listed in Rule 122 are doubled in Rule 3.

Rule 124. Reporter's transcript [repealed]

~~(a) [Notice to prepare transcript] When an appellant desires to present any point which requires a consideration of the oral proceedings, including oral instructions given or refused by the court, he shall serve on the respondent and file with the clerk of the trial court, within 10 days after filing of the notice of appeal, a notice to prepare a reporter's transcript of the oral proceedings and such oral instructions given or refused as he shall desire transcribed. A copy of this notice shall be transmitted by the clerk without delay to the reporter who shall within 10 days thereafter file his estimate with the clerk or notify the clerk in writing of the date that he notified the appellant directly of the estimated cost of preparing the reporter's transcript on appeal. The voir dire examination of jurors, the opening statements, the arguments to the jury, and the proceedings on a motion for new trial shall not be transcribed as part of the oral proceedings unless they are specified in the notice to the clerk. The oral proceedings shall include such portions of depositions as have been received in evidence and such portions thereof as shall have been offered and rejected. The portions rejected and the objections thereto shall be clearly indicated.~~

~~(b) [Partial transcript by stipulation or designation] The parties, by stipulation filed with the clerk of the trial court within the time prescribed for filing the notice to prepare a~~

reporter's transcript, may direct that any part of the oral proceedings be not transcribed. If the appellant, in his notice to the clerk, states the points to be raised by him on the appeal, he may designate the portions of the oral proceedings to be transcribed, or direct the omission of any portions which he deems unnecessary, and in such event shall be precluded from presenting any grounds for reversal not embraced within the points stated by him, unless the reviewing court on motion shall permit the appellant to present additional errors or grounds of appeal on such terms as it may prescribe. Within 10 days after the service of the appellant's notice to prepare the reporter's transcript pursuant to this rule, or to prepare the clerk's transcript pursuant to subdivision (a) of rule 125, the respondent may serve and file a notice designating the oral proceedings, including oral instructions given or refused not designated in the appellant's notice, which he desires transcribed. Only those portions of the oral proceedings and instructions designated in the notices of the parties shall be transcribed; provided, however, that if any portion of the testimony of a witness is designated by either party for inclusion in the reporter's transcript, the whole of his testimony shall be included unless the parties otherwise stipulate.

(c) [Deposit or waiver of reporter's charges] The notice given by the appellant under the foregoing provisions of this rule shall not be effective for any purpose unless, within 10 days after notification from the clerk of his estimate of the cost of preparing the reporter's transcript as designated by the notices of the parties, or within 10 days after being notified directly by the reporter, the appellant shall either deposit with the clerk an amount of cash equal to the estimated cost with directions to apply the same to the fees of the reporter or file with the clerk a waiver of such deposit signed by the reporter. When the appellant has complied with the provisions hereof, the clerk shall forthwith direct the reporter to prepare the reporter's transcript in accordance with the notices of the parties.

(d) [Preparation of transcript] Within 20 days after direction from the clerk or the receipt of the fees from the appellant the reporter shall complete and file with the clerk an original reporter's transcript as directed, and certify the same as correct. One week after the deadline for filing the transcript, the clerk shall accept completed portions of the transcript from the lead reporter in a multi-reporter case even if not all portions of the transcript are complete. The clerk shall pay promptly each reporter who certifies under penalty of perjury that all of his or her portions of the transcript are completed. The reporter shall note in the transcript all places where omissions of any oral proceedings occur (and the nature of the omitted matter) and shall also indicate the place where exhibits were received in evidence or were offered and marked for identification, and shall identify the exhibits so received or so offered. The reporter shall not transcribe or copy in the reporter's transcript any documents which, under the provisions of rule 125, may be included in the clerk's transcript on appeal.

(e) [Settled statement where transcript unavailable] If, without fault of the appellant, the reporter refuses or becomes unable or fails to transcribe all or any portion of the oral proceedings designated by the parties, any party may, within 15 days after the expiration of the time allowed by this rule for such transcription, or of any lawful extension thereof, and on 5 days' written notice, make a motion for leave to prepare a statement of the portions of the oral proceedings which the reporter refuses, is unable, or

~~fails to transcribe. If the trial court grants the motion, proceedings for the settlement of the statement shall be had as provided in rule 127, except that the party making the motion shall serve and file his proposed statement within 20 days after the making of the order granting leave therefor and the adverse party shall serve and file his proposed amendments to such statement within 10 days after service of the statement. If the settled statement contains all the oral proceedings, it shall become a part of the record on appeal in lieu of the reporter's transcript, but if it contains only a portion of the oral proceedings, it shall be incorporated in the reporter's transcript. This remedy is in addition to any remedy given by law.~~

Comment. The subject matter of this rule is now covered by Rule 4.

Rule 125. Clerk's transcript and original papers [repealed]

~~(a) [Appellant's designation of papers or records] Within 10 days after filing the notice of appeal, the appellant shall serve on the respondent and file with the clerk of the trial court a notice designating the papers or records on file or lodged with the clerk, including the clerk's minutes and any written opinion of the trial court and exhibits either admitted in evidence or rejected, and any notices, affidavits, orders, and written instructions given or refused, which he desires incorporated in the record on appeal. The notice designating papers and records and the notice to prepare the reporter's transcript may be included in the same document, and both notices may be included in the document containing the notice of appeal.~~

~~(b) [Designation by respondent or by stipulation] Within 10 days after service of the appellant's notice, the respondent may serve on the appellant and file with the clerk a notice designating additional papers or records, including the clerk's minutes, any written opinion of the trial court, and exhibits either admitted in evidence or rejected, and any notices, affidavits, orders, and written instructions given or refused, to be included in the record on appeal. In lieu of such individual notices the parties, within 10 days after the filing of the notice of appeal, may file a written stipulation designating the papers or records to be included in the record on appeal.~~

~~(c) [Clerk's charges] The notice given by the appellant under the foregoing provisions of this rule shall not be effective for any purpose unless, within 10 days after notification from the clerk of his estimate of the cost of preparing the transcript, the appellant shall make arrangements with the clerk for the payment thereof.~~

~~(d) [Preparation of clerk's transcript] Within 10 days after the appellant has arranged for payment of the cost of the transcript, as provided in subdivision (c), the clerk shall prepare and certify a transcript consisting of either copies or originals, as specified in subdivision (e) of:~~

~~The following whether designated in the notices or stipulations or referred to in the statements of the parties or not: (1) the notice of appeal; (2) the notices or stipulations to prepare the clerk's transcript and the reporter's transcript, if any, and the notices or stipulations for the preparation of a settled statement or agreed statement, if any; (3) the judgment appealed from with an endorsement by the clerk showing the date notice of entry thereof was mailed by the clerk or served by a party; (4) any notice of~~

~~intention to move for a new trial or motion to vacate the judgment, and the ruling thereon, if any.~~

~~The following, if they have been designated by any of the parties: (5) the judgment roll, or such parts thereof as have been designated by the parties; (6) any other papers or records, including exhibits admitted in evidence or rejected, notices, affidavits, orders, and written instructions given or refused, on file or lodged with the clerk.~~

~~(e) [Matters not to be copied] Except when the record on appeal is prepared by a photocopying process as provided in subdivision (a) of rule 9, captions and formal parts of papers and verifications and proofs of service of such papers shall be omitted unless one of the parties expressly requests their inclusion, but the clerk shall state in his transcript the nature of such omitted matters. No exhibit admitted in evidence or rejected, notice, affidavit, pleading, order, written instructions given or refused, or other paper on file or lodged with the clerk (except the notice of appeal) shall be copied if it is possible for the clerk to transmit the original to the reviewing court, but where such matters are properly designated by the parties in either notice or stipulation, or referred to in the list accompanying an agreed statement, or are otherwise required by these rules, the clerk shall include the originals thereof in the record on appeal, and transmit them to the reviewing court. The notice of appeal, matters appearing only in the minutes or other records of the trial court, and anything properly designated or referred to, the original of which it is not possible to transmit, shall be copied by the clerk, and the copies made part of the record on appeal. In no event shall the clerk copy in his transcript or transmit to the reviewing court (except by order of that court or stipulation of the parties) the original of any deposition.~~

~~(f) [Appeal on judgment roll] Where the appellant has designated only a clerk's transcript consisting of part or all of the matters specified in rules 125(a) and 125(b) and has not given notice to prepare a reporter's transcript, the respondent may not require the preparation of a reporter's transcript but he may counter-designate any exhibits, affidavits, papers or records which may properly be included in a clerk's transcript. Where the appellant has designated only the papers and records constituting the judgment roll and has not given notice to prepare a reporter's transcript, the judgment roll shall constitute the record on appeal, and the respondent may not require any addition thereto. In either case, however, on motion of the respondent the reviewing court may allow augmentation of the record whenever it is necessary to prevent a miscarriage of justice.~~

Comment. The subject matter of this rule is now covered by Rule 5.

Rule 126. Agreed statement [repealed]

~~(a) [Contents of agreed statement] An appeal may be presented on a record consisting in whole or in part of an agreed statement. Within 30 days after filing the notice of appeal, the appellant shall file with the clerk of the trial court the original statement signed by the parties. The statement shall show the nature of the controversy, the basis on which it is claimed that the reviewing court has jurisdiction and how the questions arose in and were decided by the trial court, and should set forth only such facts alleged and proved, or sought to be proved, as are necessary to a determination of the questions on appeal. The statement shall contain a copy of the judgment and a copy of~~

the notice of appeal with its filing date, together with any notice of intention to move for a new trial or motion to vacate the judgment, the ruling thereon, if any, and a recital or resume of any oral proceedings thereon. The statement shall be accompanied by a list of such exhibits admitted in evidence or rejected, notices, affidavits, orders, instructions given or refused, or other papers on file or lodged with the clerk, as the parties desire to have transmitted to the reviewing court, with the statement.

(b) [Extension of time] Within 10 days after filing the notice of appeal, the parties may file with the clerk of the trial court a preliminary stipulation stating that they are attempting to prepare an agreed statement. This stipulation shall have the effect of extending for a period of 40 days from the date of filing of the notice of appeal the time for service and filing of the notices of the appellant provided for in rules 124, 125 and 127 in the event that the parties are unable to agree on a statement.

Comment. The subject matter of this rule is now covered by Rule 6.

Rule 127. Settled statement [repealed]

(a) [Proposal of narrative statement] If, in lieu of a reporter's transcript, the appellant desires to set forth the oral proceedings by a settled statement, he shall serve and file a notice so stating within 10 days after filing the notice of appeal. Within 20 days thereafter the appellant shall serve and file a condensed statement in narrative form of all or such portions of the oral proceedings as he deems material to the determination of the points on appeal. Where necessary for the purposes of accuracy, clarity or convenience, portions of the evidence may be set forth by question and answer, subject to the approval of the court in settling the statement. If the condensed statement purports to cover only a portion of the oral proceedings, the appellant shall state the points to be raised by him on appeal, and in such event shall be precluded from presenting any grounds for reversal not embraced within the points stated by him unless the reviewing court, on motion, shall permit him to present additional errors or grounds of appeal on such terms as it may prescribe. Within 10 days after service of said narrative statement the respondent may serve and file his proposed amendments thereto. The appellant in his condensed statement and the respondent in his proposed amendments may incorporate any oral instructions given or refused which such party deems material.

(b) [Appellant's transcript available to respondent] If the appellant has prepared his proposed statement from an entire or partial transcript of the oral proceedings, and after service of his proposed statement declines to make such transcript available to the respondent, the municipal court, on such terms and conditions as it deems just, may direct the appellant to make his copy of the transcript available to the respondent. If the appellant fails to comply with such direction, the court on motion of the respondent shall strike the proposed statement from the files.

(c) [Settlement and engrossment] On the filing by the respondent of his proposed amendments or on the expiration of the time therefor (whichever shall first occur), the clerk shall set a time not more than 10 days thereafter for settlement of the statement by the judge who tried the case, and shall give not less than 5 days' notice by mail to all parties of the time set. At the time set, or at the time to which the judge may continue the hearing, he shall settle the statement and fix the time within which the appellant shall

~~engross it as settled. Within the time so fixed the appellant shall engross the statement in accordance with the order of the judge and shall serve and file the engrossed statement. If the respondent does not serve and file objections to the engrossed statement within five days thereafter, it shall be presumed that it is engrossed in accordance with the order of the judge and shall be presented by the clerk to the judge for certification. If the parties stipulate that the statement as originally served or as engrossed is correct, such stipulation shall have the same effect as certification thereof by the judge.~~

Comment. The subject matter of this rule is now covered by Rule 7.

Rule 128. Correction and certification of record [repealed]

~~(a) [Request for correction of record] Immediately on the completion of the clerk's and reporter's transcripts the clerk shall mail notice thereof to all parties, and within 10 days after mailing of such notice, any party may file a request for correction of such transcripts. If no request for correction is filed within such time, the clerk shall certify the record as correct.~~

~~(b) [Hearing and certification] If any party files a request for correction of the transcripts within such time, the clerk shall set a time not more than 10 days thereafter for certification of the transcripts by the judge who tried the case, and shall give not less than 5 days' notice thereof by mail to all parties. At the time set or at the time to which the judge may continue the hearing, he shall determine the request for correction, and if none is allowed, shall certify the transcripts as correct. If corrections are allowed by the judge, he shall fix the time within which they shall be made by the clerk or reporter, and on the transcripts being corrected as directed, shall certify them as correct. If no time for correction is fixed by the trial judge, the corrections shall be made by the clerk or reporter within 30 days after their allowance. The parties at any time may stipulate that the whole or any portion of the record is correct, and such stipulation shall render unnecessary the certification by either the clerk or judge of the record or the portion stipulated to by the parties.~~

Comment. The subject matter of this rule is now encompassed by Rule 12.

Rule 129. Form of record [repealed]

~~(a) [Size of paper, etc.] The reporter's transcript shall be prepared as provided in subdivision (b) of rule 9. All papers copied by the clerk for the record shall be prepared as provided in subdivision (a) of rule 9.~~

~~(b) [Indexes] The clerk shall include at the beginning of each volume of his transcript an alphabetical and a chronological index referring to each paper or record therein, and he shall also include a list of original exhibits, notices, affidavits, orders, written instructions given or refused, and other papers included in the record with a brief description of each of them. The reporter shall include at the beginning of each volume of his transcript an alphabetical and a chronological index referring to the page at which the direct examination, the cross-examination, the redirect examination, and the recall of each witness begins. He shall also indicate in a separate table in the first volume of the reporter's transcript the page at which any exhibit or other document copied therein appears, and the page at which he has noted the omission of any exhibit or other~~

~~document. The contents of each transcript shall be arranged chronologically. So far as practicable the arrangement and indexing of an agreed or settled statement shall conform to the foregoing requirements.~~

~~(c) [Binding and cover] The reporter's transcript shall be bound in volumes of not more than 300 pages. The cover of each volume shall be of the same size as the pages therein, and there shall be endorsed thereon the title of the case, the name of the trial judge and judicial district, and the names and addresses of the attorneys representing the parties on the appeal.~~

Comment. The subject matter of this rule is now covered by Rule 9.

Rule 130. Transmission and filing of record [repealed]

~~When the appellant has paid or been excused from paying the filing fee and the record on appeal has been completed in accordance with these rules, the clerk of the trial court shall forthwith transmit the record to the county clerk for filing, and may be compelled to do so by order of the reviewing court, made on motion.~~

Comment. The subject matter of this rule is now covered by Rule 10.

Rule 131. Record on cross-appeal [repealed]

~~Where several parties appeal from the same judgment or any part or parts thereof, or where there is a cross-appeal pursuant to rule 123, a single record on appeal shall be prepared and filed within the time prescribed for filing the record in the latest appeal. Such record shall be prepared in accordance with rules 124 and 125 unless all appellants give notice of intention to proceed under rule 127, or unless the parties stipulate to proceed under rule 126. Unless the trial court orders otherwise, the initial expense of preparing the record shall be borne equally by the parties appealing.~~

Comment. The subject matter of this rule is now covered by Rule 11.

Rule 132. Augmentation and correction of record [repealed]

~~(a) [Augmentation] On suggestion of any party or on its own motion, the reviewing court, on such terms as it deems proper, may order that the original or a copy of a paper, record or exhibit offered at or used on the trial or hearing below and on file in or lodged with the trial court be transmitted to it, or that portions of the oral proceeding be transcribed, certified and transmitted to it, or that an agreed or settled statement of portions of the oral proceedings be prepared and transmitted to it; and when so transmitted they shall be deemed part of the record on appeal.~~

~~(b) [Correction] If any material part of the record is incorrect in any respect, or lacks proper certification, the reviewing court, on suggestion of any party or on its own motion, may direct that it be corrected or certified.~~

~~(c) [Correction by trial court or parties] The reviewing court may submit to the trial court for settlement any differences of the parties with respect to alleged omissions or errors in the record, and the trial court shall make the record conform to the truth. The reviewing court may also direct that omissions or errors be corrected pursuant to the stipulation of the parties filed with the clerk of that court.~~

Comment. The subject matter of this rule is now covered by Rule 12.

Rule 133. Abandonment and dismissal [repealed]

~~(a) [Before record filed] At any time before the filing of the record in the reviewing court, the appellant may file in the office of the clerk of the trial court a written abandonment of the appeal; or the parties may file in said office a stipulation for abandonment. The filing of either document shall operate to dismiss the appeal and to restore the jurisdiction of the trial court. Upon such a dismissal, the appellant shall be entitled to the return of that portion of any deposit in excess of the actual cost of preparation of the record on appeal up to that time.~~

~~(b) [After record filed] After the filing of the record in the reviewing court an appeal may be dismissed by that court on written request of the appellant or stipulation of the parties filed with the clerk of the reviewing court.~~

~~(c) [Dismissal by court] If the appellant shall fail to perform any act necessary to procure the preparation or filing of the record on appeal or shall otherwise fail to prosecute his appeal with diligence, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed by the reviewing court on motion of the respondent or on its own motion.~~

~~(d) [Notification by clerk] The clerk of the court in which an abandonment is filed shall immediately notify the adverse party of the filing thereof. The clerk of the reviewing court shall immediately notify the parties of any order of dismissal made by that court.~~

~~(e) [Approval of compromise] Whenever the guardian of a minor or of an insane or incompetent person seeks approval of a proposed compromise of a case pending on appeal, the reviewing court may, by order, refer the matter to the trial court with instructions to hear the same and determine whether the proposed compromise is for the best interests of the ward, and to report its findings. On receipt of the report, the reviewing court shall make its order approving or disapproving the compromise.~~

Comment. The subject matter of this rule is now covered by Rule 19.

Rule 134. Hearings [repealed]

~~Appeals in civil cases shall be calendared, argued and determined, notice of hearings shall be given, and petitions for rehearing and answers thereto shall be filed and acted upon as prescribed in Chapter I of this division (commencing with rule 101).~~

Comment. The subject matter of this rule is now covered by Rules 22 & 41.

Rule 135. Costs on appeal [repealed]

~~(a) [Rights to costs] Except as provided in this rule, the prevailing party shall be entitled to costs on appeal from a municipal or justice court as an incident to the judgment on appeal. In the case of a general and unqualified affirmance of the judgment, or the dismissal of an appeal, the respondent shall be deemed the prevailing party; in the case of a reversal, in whole or in part, or of a modification of the judgment, the appellant shall be deemed the prevailing party. In any case in which the interests of justice require it, the reviewing court may make any award or apportionment of costs which it deems proper. If the appeal is frivolous or taken solely for the purpose of delay or if any party has required in the record on appeal the inclusion of any matter not reasonably material to~~

~~the determination of the appeal, or has been guilty of any other unreasonable infraction of the rules governing appeals, the reviewing court may impose upon offending attorneys or parties those penalties, including the withholding or imposing of costs, that the circumstances of the case and the discouragement of like conduct may require.~~

~~(b) [Entry of judgment for costs] In any case on appeal from a municipal or justice court in which the reviewing court directs the manner in which costs shall be awarded or denied, the clerk shall enter on the record and insert in the remittitur a judgment in accordance with those directions. In the absence of those directions by the reviewing court, the clerk shall enter on the record and insert in the remittitur to the municipal or justice court a judgment for costs as follows: (1) in the case of a general and unqualified affirmance of the judgment, for the respondent; (2) in the case of a dismissal of the appeal, for the respondent; (3) in the case of a modification of the judgment, for the appellant; and (4) in the case of a reversal of the judgment, in whole or in part, with or without directions, for the appellant. If the clerk fails to enter judgment for costs as provided in this subdivision, the reviewing court, on motion made not later than 30 days after issuance of the remittitur or on its own motion, may recall it for correction.~~

~~(c) [Items recoverable as costs] The party to whom costs are awarded may recover only the following, if actually incurred: (1) the cost of preparation of an original and one copy of any type of record on appeal authorized by these rules if that party is the appellant, or one copy of the record if the party is the respondent, subject to reduction by order of the reviewing court pursuant to subdivision (a) of this rule; but the expense of any method of preparation in excess of the cost of preparing the record in typewriting shall not be recoverable as costs, unless the parties so stipulate; (2) the cost of production of additional evidence; and (3) filing and notary fees and expense of service, transmission, and filing of the record, briefs, and other papers.~~

~~(d) [Procedure for claiming costs] If costs are awarded to a party by a reviewing court and the party claims those costs, the party shall, within 30 days after the remittitur is filed with the trial court, serve on all parties and file with the clerk of the trial court a memorandum of costs, verified as prescribed by rule 870(a)(1).~~

~~A party may move to have costs taxed in the same manner and within a like time after service of a copy of the memorandum of costs, as prescribed by rule 870(b). After the costs have been taxed, or after the time for taxing the costs has expired, the award of costs may be enforced in the same manner as a money judgment.~~

~~(e) [Procedure for imposing sanctions]~~

~~(1) A party seeking monetary sanctions on the ground that the appeal is frivolous or taken solely for purposes of delay or that there has been an unreasonable infraction of the rules governing appeals shall serve and file a motion under rule 104 no later than 10 days after the time the appellant's reply brief is due or at the time of filing a motion to dismiss the appeal.~~

~~(2) A party who filed a motion to dismiss the appeal before filing a brief may make or renew the motion for sanctions up to 10 days after the time the appellant's reply brief is due.~~

~~(3) A motion under (1) or (2) shall include a declaration supporting the amount of sanctions being sought.~~

~~(4) The court shall notify a party or an attorney if it is considering imposing sanctions on its own motion or on motion of a party.~~

~~(5) The party or attorney against whom sanctions are sought may serve and file a written opposition within 10 days after notice from the court that it is considering imposing sanctions; failure to do so shall not be deemed consent to the award of sanctions. An opposition should not ordinarily be filed unless the court has sent notice that it is considering imposing sanctions or requests the party's or attorney's views.~~

~~(6) Unless otherwise ordered, the issue of sanctions and their amount will be argued at the time of oral argument on the merits of the appeal.~~

Comment. The subject matter of this rule is now covered by Rule 26.

Rule 136. Definitions [repealed]

~~In this chapter, unless the context or subject matter otherwise requires:~~

~~(a) The past, present and future tenses shall each include the other; the masculine, feminine and neuter gender shall each include the other; and the singular and plural number shall each include the other.~~

~~(b) "Trial court" means the municipal or justice court from which an appeal is taken pursuant to these rules; "reviewing court" applies to the court in which an appeal is pending, and means the appellate department of the superior court.~~

~~(c) The party appealing is known as the "appellant," and the adverse party as the "respondent."~~

~~(d) "Shall" is mandatory and "may" is permissive.~~

~~(e) "Party," "appellant," "respondent," "petitioner," or other designation of a party include such party's attorney of record. Whenever under these rules a notice is required to be given to or served on a party, such notice or service shall be made on his attorney of record, if he has one.~~

~~(f) "Serve and file" mean that a document filed in a court is to be accompanied by proof of prior service in a manner permitted by law of one copy of the document on counsel for each adverse party who is represented by separate counsel.~~

~~(g) "Judgment" includes any judgment, order or decree from which an appeal lies.~~

~~(h) "Judgment roll" with respect to a justice court consists of the same papers as in the municipal court.~~

~~(i) "Presiding judge" includes the acting presiding judge.~~

~~(j) "Clerk" with respect to a justice court means the judge if there be no clerk.~~

~~(k) "Written," "writing," "typewriting" and "typewritten" include other methods of duplication equivalent in legibility to typewriting.~~

~~(l) Rule and subdivision headings do not in any manner affect the scope, meaning or intent of the provisions of these rules.~~

Comment. The subject matter of this rule is now covered by Rule 40.

Rule 137. Applications on routine matters [repealed]

~~Except as otherwise provided in these rules, applications to extend time for filing briefs, applications to shorten time, and applications relating to other matters of routine shall be served and filed; but the presiding judge of the reviewing court may require an additional showing to be made and for good cause may excuse advance service. The application shall set forth facts showing (1) good cause for granting the application, and (2) any previous applications granted or denied to any party after filing of the notice of appeal. The application may be granted or denied by the presiding judge, unless the court otherwise determines. The applicant shall provide to the clerk addressed, postage-prepaid envelopes and sufficient additional copies of the application for later mailing by the clerk to all other parties of a copy of the order granting or denying the application, together with a copy of the application.~~

Comment. The subject matter of this rule is now covered by Rule 43.

Rule 138. Extension and shortening of time [repealed]

~~(a) [Computation of time] The time for doing any act required or permitted under these rules shall be computed and extended in the manner provided by the Code of Civil Procedure.~~

~~(b) [Extension by trial court] The presiding judge of the trial court, or a judge designated by him, for good cause shown on application made as provided in rule 137, may extend the time for doing any act involved in the preparation of the record on appeal in a civil case, prior to the expiration of such time or any valid extension thereof; provided, however, that the time specified for payment of the fee for filing the record in the reviewing court may not be extended by the trial court. Such extensions granted to any party shall not exceed 60 days in the aggregate for any and all acts in preparation of the record, and no single extension shall be for a period in excess of 10 days. Anything in these rules to the contrary notwithstanding, the initial extension granted to any party by the trial court may be granted ex parte.~~

~~(c) [Extension by presiding judge] The presiding judge of the reviewing court, for good cause shown, may extend the time for doing any act required or permitted under these rules, except the time for filing a notice of appeal. An application for extension of time shall be made as provided in rule 137.~~

~~(d) [Shortening time] The presiding judge of the reviewing court, for good cause shown, may shorten the time for serving or filing a paper incident to an appeal. An application to shorten time shall be made as provided in rule 137.~~

Comment. The subject matter of this rule is now covered by Rule 45.

Rule 139. Substitution of parties and attorneys

~~(a) [Parties] Whenever a substitution of parties to a pending appeal is necessary, it shall be made by proper proceedings instituted for that purpose in the trial court. On suggestion thereof and the presentation of a certified copy of the order of substitution made by the trial court, a like order of substitution shall be made in the reviewing court.~~

~~(b) [Attorneys] Withdrawal or substitution of attorneys may be effected by serving and filing a stipulation in the reviewing court, signed by the party, the retiring attorney~~

~~and any substituted attorney. In the absence of stipulation, withdrawal or substitution may be effected only by an order made pursuant to a motion in the reviewing court; except that unless otherwise ordered by the court, service of the motion need be made only on the party and the attorneys directly affected thereby. A notification of any withdrawal or substitution shall be given by the clerk of the reviewing court to the clerk of the trial court, and substituted counsel shall forthwith give notice thereof to all parties.~~

Comment. The subject matter of this rule is now covered by Rule 48.

Rule 140. Writ of supersedeas [repealed]

~~A petition for a writ of supersedeas shall bear the same title as the appeal, and shall be served and filed in the reviewing court in which the appeal is pending. The petition shall be verified, and shall contain a statement of the necessity for the writ and supporting points and authorities. If the record on appeal has not been filed with the reviewing court, the petition shall contain a description of the judgment, the date of its entry, the fact and date of filing of the notice of appeal, and a statement of the subject matter of the appeal sufficient to advise the reviewing court of the question involved. A request for a temporary stay pending the granting or denial of the writ may be included in the petition, or may be made separately and without service on the respondent. The writ may be issued on any conditions which the reviewing court deems just.~~

~~If the writ or stay issues, the reviewing court shall notify the trial court pursuant to rule 56(d).~~

Comment. The subject matter of this rule is now covered by Rule 49.

Rule 141. Substitute judge where trial judge unavailable [repealed]

~~Whenever by these rules any act is required to be done by the judge who tried the case, and such judge is unavailable or unable to act at the time fixed therefor, the act shall be done by another judge of the same court, to be designated by the presiding judge thereof, or if there is no judge of the court available to act, then the act shall be done by a judge designated by the chairman of the Judicial Council.~~

Comment. The subject matter of this rule is now covered by Rule 51.

Rule 142. Presumption where record not complete [repealed]

~~If a record on appeal does not contain all of the papers, records and oral proceedings, but is certified bythe judge or the clerk, or stipulated to by the parties, in accordance with these rules, it shall be presumed in the absence of proceedings for augmentation that it includes all matters material to a determination of the points on appeal. On an appeal on the judgment roll alone, or on a partial or complete clerk's transcript, the foregoing presumption shall not apply unless the error claimed by appellant appears on the face of the record.~~

Comment. The subject matter of this rule is now covered by Rule 52.

Rule 143. Scope and construction [repealed]

~~(a) [Courts and proceedings covered] This chapter applies to appeals from municipal and justice courts in civil cases, except small claims cases. The rules shall be liberally construed to secure the just and speedy determination of appeals.~~

~~(b) [Relief from default] The reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal.~~

Comment. The subject matter of this rule is now covered by Rule 53.

Rule 144. Remittitur [repealed]

~~(a) [Issuance and transmission] Upon the expiration of the period during which a transfer may be ordered, the clerk of the superior court shall remit to the court from which the appeal was taken a certified copy of the judgment of the superior court and of its opinion, if any, and also all the original exhibits, orders, affidavits, papers, and documents which were sent to the superior court in connection with the appeal, except the statement or transcript on appeal and the notice of appeal. After the certified copy of the judgment has been remitted to the court below, the superior court has no further jurisdiction of the appeal or of the proceedings thereon, and the lower court shall make all orders necessary to carry its judgment or order into effect or otherwise proceed in conformity to the decision on appeal.~~

~~(b) [Issuance forthwith] The court may direct the immediate issuance of the remittitur on stipulation of the parties.~~

~~(c) [Stay of issuance] The court, for good cause, may stay the issuance of the remittitur for a reasonable period.~~

~~(d) [Recall of remittitur] A remittitur may be recalled by order of the court on its own motion, on motion after notice supported by affidavits, or on stipulation setting forth the facts which would justify the granting of a motion.~~

~~(e) Repealed, eff. Jan. 1, 1977.~~

Comment. The subject matter of this rule is now covered by Rule 25.

CHAPTER III. TRIAL OF SMALL CLAIMS CASES ON APPEAL ~~FROM MUNICIPAL AND JUSTICE COURTS~~

Rule 151. Scope

This chapter applies to appeals ~~to the superior court from municipal and justice courts~~ in small claims cases.

Comment. Technical amendment to reflect trial court unification.

Rule 155. Abandonment, dismissal, and judgment for failure to bring to trial

(a) [Before appeal filed] At any time before the filing of the appeal ~~in the superior court~~, the appellant may file in the office of the clerk of the trial court a written abandonment of the appeal; or the parties may file in that office a stipulation for abandonment. The filing of either document shall operate to dismiss the appeal and to restore the jurisdiction of the trial court.

(b) [After record filed] After the filing of an appeal in the superior court it may be dismissed by that court on written request of the appellant or stipulation of the parties filed with the clerk of the superior court.

(c) [Dismissal or judgment by court] The appeal shall be dismissed if not brought to trial within one year from the date of filing the appeal in the superior court. If

after trial anew a new trial is ordered, the appeal in the case shall be dismissed if the case is not brought to trial within one year from the date of entry of the order for the new trial. Notwithstanding the foregoing provisions, dismissal shall not be ordered or judgment entered if there was in effect a written stipulation extending the time for the trial or if the appellant shows that he or she exercised reasonable diligence to bring the case to trial. In any event the appeal shall be dismissed if the case is not brought to trial within three years after either the appeal is filed in the superior court or the most recent new trial order is entered in the superior court.

(d) [Notification by clerk] When an appellant files an abandonment of appeal, the clerk of the court in which the abandonment is filed shall immediately notify the adverse party or parties of the filing. The clerk of the superior court shall immediately notify the parties of any order of dismissal or of any judgment for defendant pursuant to subdivision (c) made by that court.

(e) [Return of papers] Upon dismissal by the superior court of an appeal ~~from a municipal or a justice court~~ *in a small claims case*, the clerk of the superior court shall transmit to the trial court a copy of the order of dismissal and all original papers and exhibits transmitted to the superior court. The trial court shall thereafter have the same jurisdiction as if no appeal had been taken.

(f) [Approval of compromise] Whenever the guardian of a minor or of an insane or incompetent person seeks approval of a proposed compromise of a case on appeal required to be tried anew or in which a new trial has been ordered, the superior court may hear and determine whether the proposed compromise is for the best interest of the ward.

Comment. Technical amendment to reflect trial court unification.

Rule 156. Definitions

In this chapter, unless the context or subject matter otherwise requires:

(a) The past, present, and future tenses each include the other; the masculine, feminine, and neuter genders each include the other; and the singular and plural numbers each include the other.

(b) "Shall" is mandatory and "may" is permissive.

(c) "Trial court" means the ~~municipal or justice~~ ***superior*** court from which the appeal is taken.

(d) "Appellant" means the party appealing; "plaintiff" and "defendant" refer to the parties as they were designated in the trial court.

(e) Designation of a party by any terminology includes such party's attorney of record. Whenever under this chapter notice is required to be given to or served on a party, the notice or service shall be made upon the attorney of record if the party has one.

(f) ~~"Clerk" with respect to a justice court means the judge if there is no clerk.~~

~~(g)~~ Rule and subdivision headings do not in any manner affect the scope, meaning, or intent of the provisions of these rules.

Comment. Technical amendment to reflect trial court unification.

~~CHAPTER IV. APPEALS FROM MUNICIPAL AND JUSTICE COURTS IN CRIMINAL CASES~~

Rule 180. Applicability to felonies, misdemeanors, infractions

~~(a) [Rules applicable to felonies and superior courts] Rule 30 et seq. apply to appeals from the judgments and appealable orders of all courts in felony cases, and to appeals from the judgments and appealable orders of superior courts in all criminal cases. References in those rules to "superior court" mean "the court that pronounced judgment or issued the appealable order," and include a municipal or justice court that pronounced judgment or issued an appealable order in a felony case.~~

~~(b) [Rules applicable to misdemeanors and infractions] Rule 181 et seq. apply to appeals from the judgments and appealable orders of municipal and justice courts in misdemeanor and infraction cases.~~

Comment. The subject matter of this rule is now covered by Rules 30 et seq.

Rule 181. Definitions

~~The definitions in rule 136 apply to this chapter unless the context otherwise requires.~~

Comment. The subject matter of this rule is now covered by Rules 30 et seq.

Rule 182. Notice of Appeal

~~(a) [Time for filing] An appeal in a criminal case from a judgment or appealable order of a municipal or justice court is taken by filing with the clerk of that court a written notice of appeal signed by the appellant or appellant's attorney. The notice shall specify the judgment or order or part thereof from which the appeal is taken. The notice shall be liberally construed in favor of its sufficiency.~~

~~The notice of appeal shall be filed within 30 days after the rendition of the judgment or the making of the order; but if the defendant is committed before final judgment for insanity or narcotics addiction or indeterminately as a mentally disordered sex offender, the notice of appeal shall be filed within 30 days after the commitment.~~

~~If the notice of appeal is not filed within the time prescribed, the appeal shall be void and of no effect. A notice received after the expiration of the time prescribed shall be marked by the clerk "Received (date) but not filed", and the clerk shall advise the party seeking to file the notice that it was received but not filed because the period for filing had elapsed.~~

~~A notice of appeal filed prior to the time prescribed is premature but may, in the discretion of the reviewing court for good cause, be treated as filed immediately after the rendition of the judgment or the making of the order.~~

~~References in this subdivision to the clerk apply to the judge of a justice court, in the absence of a clerk.~~

~~(b) [Notification by clerk] The clerk of the trial court, or the judge thereof if there is no clerk, shall forthwith mail a notification of the filing of the notice of appeal to each party other than the appellant. The notification shall state the number and title of the case and the date the notice of appeal was filed. The failure of the clerk or judge to give such notification shall not affect the validity of the appeal.~~

Comment. The subject matter of this rule is now covered by Rule 31. Rule 31 gives an appellant 60 days to file a notice of appeal.

Rule 183. Record on appeal

~~(a) The record on an appeal to a superior court from a municipal or an inferior court in a criminal case shall consist of the following items, or so many thereof as may exist in the particular case:~~

~~1. The complaint;~~

~~2. The plea or pleas of the defendant;~~

~~3. All written instructions given, or requested and refused;~~

~~4. The verdict, or if a jury was waived, the entry of such waiver in the minutes or docket, and the finding of the court upon the issues;~~

~~5. Any written motion or notice of motion for new trial, in arrest of judgment or to dismiss or otherwise terminate the action, or the entry in the minutes or docket of any oral motion to the same effect, and the order of the court thereon;~~

~~6. Any demurrer to the complaint, and the order of the court thereon;~~

~~7. All other minutes of the court relating to the action;~~

~~8. The judgment, and the order appealed from, if the appeal is from an order;~~

~~9. The notice of appeal;~~

~~10. Any statement or transcript on appeal, or both, settled and certified by the trial judge as hereinafter provided for in rules 184 and 187;~~

~~11. All exhibits, instructions, orders, affidavits, papers and documents properly referred to and identified in such statement or transcript, as provided in rule 184;~~

~~12. If the appeal is from an order made after judgment, items 2, 3, 4, 5, 6 and 7 may be omitted, and the record shall include any written motion and any written notice of motion, the denial or granting of which is the order appealed from, or the entry in the minutes or docket of any such oral motion, and all minutes of the court relating to such motion.~~

~~(b) The matters included in the foregoing items 1 to 9 inclusive, 11 and 12 of subdivision (a), or so many of them as may be pertinent to the appeal taken, shall be prepared by the clerk of the trial court, or by the judge thereof if there is no clerk. The notice of appeal, matters appearing in the minutes or docket of the trial court and any other part of the record, the original of which it is not possible to transmit to the superior court, shall be copied as provided in subdivision (a) of rule 9 and the copies made part of the record on appeal; but the originals of all other matters shall be included in the record. As soon as the statement on appeal, including the transcript, if any, has been settled and certified, or the right of the appellant to have a statement settled and certified shall have terminated, as elsewhere provided in these rules, the clerk of the trial court, or the judge thereof if there is no clerk, shall forthwith transmit the record on appeal, with his certificate that the parts thereof are originals or copies, as the case may be, to the clerk of the superior court to which the appeal is taken.~~

Comment. The subject matter of this rule is now covered by Rule 33.

Rule 184. Statement or transcript

~~(a) Where a consideration of the evidence or any part thereof, or of any proceedings which do not otherwise constitute a part of the record on appeal as defined in~~

rule 183, is necessary to a determination of the appeal, the same must be set forth in a statement on appeal settled and certified as provided in these rules, and if not so set forth, it shall be presumed that they were such as to support the judgment or order appealed from. If all or any part of such evidence or other proceedings was reported by an official reporter, the appellant may give notice in his proposed statement that he intends to file a reporter's transcript of the evidence and proceedings so reported, and to make the same a part of the statement, and if he gives such notice he may omit any other statement of the evidence and proceedings so reported from his proposed statement.

(b) In every such statement the appellant shall specify the grounds on which he intends to rely upon appeal and set forth so much of the evidence and other proceedings as are necessary for a decision upon said grounds. Said grounds of appeal shall be stated with sufficient particularity to apprise the court and the opposing party of the rulings or other matters of which the appellant intends to complain, but this may be done by any general description calling attention to the points to be made, without specifying each separate ruling or other matter to be complained of. If one of said grounds of appeal is insufficiency of the evidence, the particulars in which it is insufficient shall also be stated, unless a reporter's transcript containing the whole thereof is to be made a part of the statement. No ground of appeal not so specified shall be considered by the superior court unless it shall appear to the satisfaction of said court that the record on appeal fairly and fully presents the evidence and other proceedings necessary for a decision thereon.

(c) It shall not be necessary in any such statement or transcript to copy any exhibit, instruction, order, affidavit, paper or document onfile with the trial court, but the same may be merely referred to by any designation sufficient to identify it. If any point is to be made on appeal as to the giving, refusal or modification of instructions, it shall be necessary to show by said statement or transcript whether any oral instructions were given and, if so, what they were, and by whom requested, and if the written instructions included in the record under rule 183 do not show by whom requested, or what modifications were made in instructions given as modified, these facts shall be set forth in the statement.

(d) An appellant who desires to have a statement settled shall, within 15 days after filing notice of appeal, serve on the respondent and file with the trial court a proposed statement on appeal. If in such proposed statement appellant gives notice that a reporter's transcript is to be filed and made a part thereof, as provided in subdivision (a) of this rule, appellant may file, within 15 days after the filing of the proposed statement, a transcript of the evidence or other proceedings reported by an official reporter, certified by that reporter to be correct, and shall within five days after such filing, notify the respondent thereof. Any such transcript, when settled and certified as provided in rule 187, shall become a part of the statement. If the transcript is not filed or notice is not given of its filing within the time limited by these rules or any lawful extension thereof, the appellant's right to have the transcript settled and certified as a part of the statement shall terminate and the trial court shall proceed upon the other parts of the proposed statement as provided in rule 187. If the failure to file such transcript in time results from the refusal, failure or inability of the reporter to make all or any part of the transcript, the appellant may, within five days after expiration of the time for filing such transcript,

~~move the trial court for leave to file amendments to the statement to cover the matters originally proposed to be in the transcript. If the trial court grants the motion, the appellant shall serve and file amendments within 15 days after the making of the order, and such amendments and the original statement shall be settled and certified as provided in rule 187. If the appellant fails to serve and file a proposed statement on appeal within the time limited by these rules, or any lawful extension thereof, the right to have a statement settled and certified shall forthwith terminate.~~

Comment. The subject matter of this rule is now covered by Rule 7.

Rule 185. Amendments to statement or transcript

~~The respondent may within 15 days after such statement is filed, or notice is given of the filing of such transcript, serve on the appellant and file proposed amendments to the statement or transcript, or both.~~

Comment. The subject matter of this rule is now covered by Rule 7.

Rule 185.5. Counsel on appeal [repealed]

~~(a) [Standards for appointment] On application of defendant-appellant, the appellate department shall appoint counsel on appeal for any defendant- appellant convicted of a misdemeanor who is subject to incarceration or a fine of more than $500 (including penalty and other assessments), or who is likely to suffer significant adverse collateral consequences as a result of the conviction, if the defendant-appellant was represented by appointed counsel in the trial court. On application, the appellate department shall appoint counsel for any other such defendant-appellants who establish their indigency as in the Courts of Appeal. A defendant is subject to incarceration or a fine if the incarceration or fine is in a sentence, or is a condition of probation, or may be ordered if the defendant violates probation. The appellate department may appoint counsel for any other indigent defendant-appellant.~~

~~(b) [Application; duty of trial counsel] If defense trial counsel believes that the client is indigent and will file an appeal, counsel shall prepare and file in the trial court an application to the appellate department for appointment of counsel. If the defendant-appellant was represented by appointed counsel in the trial court, the application shall include counsel's declaration to that effect. If the defendant-appellant was not represented by appointed counsel in the trial court, the application shall include a declaration of indigency supported by evidence in the form required by the Court of Appeal for the district where the court is located. The trial court shall transmit the application to the appellate department along with the record on appeal. A defendant-appellant may, however, apply directly to the appellate department for appointment of counsel at any time after the notice of appeal is filed.~~

~~The appellate department may take a reasonable time to confirm that the defendant-appellant still seeks the appointment of counsel. In the case of a defendant-appellant not represented by appointed counsel in the trial court, the appellate department may take a reasonable time to confirm the facts stated in the declaration of indigency.~~

~~(c) [Defendant found able to pay in trial court] If a defendant was represented by appointed counsel in the trial court and was found able to pay all or part of the cost of the~~

~~trial counsel in proceedings under Penal Code section987.8 or 987.81, the findings in those proceedings shall be included in the record of any appeal by the defendant or, if made after the record on appeal is transmitted to the appellate department, shall be transmitted to the appellate department as an augmentation of the record. In those cases, the appellate department shall conduct appropriate proceedings to determine the defendant's ability to pay or contribute to the expense of counsel on appeal; and if it finds that the defendant is able, shall order the defendant to pay all or part of the cost.~~

Comment. The subject matter of this rule is now covered by Rule 76.5.

Rule 186. Extensions of time and relief from default

~~(a) [Extensions of time] The court from which the appeal is taken, or a judge thereof, may for good cause shown by affidavit make an order granting not more than a total of 15 days additional to the time limited in these rules for serving and filing the statement, or for filing the transcript and giving notice thereof, or for proposing amendments thereto, or for engrossing the statement or transcript, or both, and presenting the same for certification. The superior court to which an appeal is taken, or if the appeal is to be heard in an appellate department, the presiding judge thereof, may, for good cause shown by affidavit, further extend the time for doing any act required by these rules, except the time for filing the notice of appeal. Every such extension shall be made upon application as provided in rule 137 before the time extended, including any previous extensions thereof, has expired.~~

~~(b) [Relief from default] The superior court may for good cause relieve a party from a default occasioned by any failure to comply with these rules, except failure to give timely notice of appeal.~~

Comment. The subject matter of this rule is now covered by Rule 45.

Rule 187. Settlement of statement or transcript [repealed]

~~Upon the filing of such proposed amendments or the expiration of the time for filing them, the trial judge shall forthwith fix a time for settlement of the statement or transcript, or both, which time shall be as early as the business of the court will permit, either in chambers or in open court, and cause notice to be mailed, at least five days before the time fixed, to each party, or, if any party appears by attorney, then to the attorney, if the mailing address of the party or attorney appears in the files of the case in which the appeal is taken. The trial judge shall at the time fixed, or any other time to which the matter may be continued, settle the statement or transcript, or both, and the amendments proposed, if any, correcting, altering, or rewriting the statement or transcript, or both, as may be necessary to make it set forth fairly and truly the evidence and proceedings relating to the specified grounds of appeal or the matters set forth by the appellant in support of it.~~

~~The appellant's specifications of grounds of appeal shall not in any case be eliminated from the settled statement. At the time of settlement the judge may direct the appellant to engross the statement or transcript, or both, as settled. Thereupon the appellant shall engross the statement or transcript, or both, as corrected and settled and present it to the judge for certification within five days from the date of settlement, and if~~

~~the appellant fails to do so within that period or any lawful extension, the right to have the statement or transcript settled or certified shall terminate. If a statement or transcript is settled and engrossed, if engrossment is ordered, the trial judge shall certify its correctness. A judge may settle and certify the statement or transcript after or before ceasing to be the trial judge. If the trial judge dies, is removed from office, becomes disqualified, or is absent from the state at the time for settling or certifying a statement or transcript, it may be settled or certified by any other judge of the court qualified to act.~~

~~The clerk of the trial court shall promptly mail copies of the statement, as settled and certified by the judge, to counsel for the parties and to unrepresented parties, unless the judge certifies that the statement proposed and filed by the appellant was settled without significant change.~~

Comment. The subject matter of this rule is now covered by Rule 7.

Rule 187.5. Experimental rule on use of recordings to facilitate settlement of statements

~~(a) [Scope of experiment] Notwithstanding any other rule, a municipal or justice court may provide by local rule that this rule applies to every appeal in a misdemeanor case in which all or part of the proceedings were officially recorded electronically.~~

~~(b) [Appellate counsel] Counsel retained for the appeal shall file notice of his or her appearance in the trial court. The clerk of the reviewing court shall send the trial court notice of the appointment of counsel on appeal, which shall be filed as an appearance by the trial court.~~

~~(c) [Trial court clerk's duties]~~

~~(1) The clerk of the trial court shall retain custody of the original sound recording, unless ordered to deliver it to the reviewing court.~~

~~(2) To the extent feasible, the clerk shall make the original sound recording available to the parties and counsel for listening in court facilities during normal business hours.~~

~~(3) Within ten days after the notice of appeal is filed, the clerk of the trial court shall prepare and label one cassette copy of the original sound recording for each party and a copy for the court's file; the copies shall be playable at one and seven-eighths inches per second.~~

~~(4) The clerk shall promptly mail a cassette copy to counsel on appeal, if known to the clerk, for each party to the appeal. If the clerk has not received notice of the appointment or retention of counsel on appeal, the cassette copy shall be mailed to trial counsel and to each party unrepresented at trial and on appeal. Each cassette copy shall be accompanied by a copy of this rule and an information leaflet published by the Administrative Office of the Courts.~~

~~(d) [Proposed statement] Counsel for the appellant (or the appellant, if unrepresented at trial and on the appeal) shall prepare a proposed statement of the case which shall include:~~

~~(1) A summary of the grounds of the appeal complying with rule 184(b).~~

~~(2) A narrative statement summarizing the basic events in the case, and as much of the evidence and rulings of the court as are relevant to the appeal. Any portion of the statement may be in the form of a verbatim transcription of the sound recording.~~

~~The proposed statement shall, within 30 days after the mailing of the cassette copy, be served on the opposing counsel of record or on the opposing party if unrepresented and filed in the trial court. If the proposed statement is not served and filed within that time, or any extension, the appellant may not proceed with the appeal unless relieved from the default.~~

~~(e) [Obligation of counsel] Unless counsel on appeal has been appointed or retained, the preparation, service and filing of the proposed statement as set forth in subdivision (e), and the other obligations imposed on counsel by this rule, are part of the obligation of representing a party at trial.~~

~~If counsel on appeal has been appointed or retained, that counsel has the primary responsibility for complying with subdivision (d) and fulfilling the other obligations imposed on counsel by this rule; and trial counsel has the duty to cooperate fully with appellate counsel to facilitate compliance.~~

~~(f) [Proposed corrections and additions] Within 20 days after service of the proposed statement, counsel for the respondent (or the respondent, if unrepresented) shall serve on the person who served the proposed statement and file either a written acceptance of the proposed statement as accurate or proposed corrections and additions to the proposed statement. Unless good cause is shown in a motion for an order permitting late filing, failure to timely serve and file proposed corrections and additions is deemed an acceptance.~~

~~If proposed corrections and additions are served and filed, counsel for the parties have an obligation to confer in person or by telephone and seek to arrive at a stipulated final statement or to narrow the area of disagreement. This obligation is not applicable when a party is unrepresented.~~

~~A stipulated final statement, or stipulated summary of remaining points of disagreement, shall be prepared and filed in the trial court by the appellant within 10 days after service of proposed corrections and additions.~~

~~(g) [Resolution of disputes] If the respondent files proposed corrections and additions, the clerk shall refer the file to the judge who tried the case or, in the judge's absence, to another judge of the court:~~

~~(1) Forthwith after a stipulated summary of points of disagreement is filed; or~~

~~(2) Forthwith after the respondent files proposed corrections and additions, if one of the parties was unrepresented at trial and remains unrepresented; or~~

~~(3) Twenty days after the respondent files proposed corrections and additions, if no stipulated final statement nor stipulated summary of points of disagreement has been filed.~~

~~The judge shall resolve all disputed issues of fact, using the available sound recordings of the proceedings to supplement the judge's memory and notes of the case. No hearing or conference shall be held unless ordered by the judge. A party may suggest that a hearing be ordered.~~

~~Within 20 days from the date the file is referred by the clerk, the judge shall certify in writing the resolution of the disputed issues. The clerk shall promptly file the judge's certificate and mail copies to counsel for the parties and to unrepresented parties.~~

~~(h) [Certification and transmittal] The clerk of the trial court shall certify and transmit to the reviewing court as part of the trial court file, pursuant to subdivision (j), either:~~

~~(1) A proposed statement which has been expressly accepted and the respondent's acceptance forthwith upon filing of the acceptance; or~~

~~(2) A proposed statement as to which no proposed corrections and additions have been timely filed promptly after expiration of time within which to file proposed corrections and additions, along with the clerk's certificate that corrections and additions were not proposed. If the respondent has moved for an order permitting late filing of proposed corrections and additions, the clerk shall defer certification and transmittal until the motion is decided; and if it is denied, the clerk shall thereupon certify and transmit the file, including the proposed statement and all papers pertaining to the motion; or~~

~~(3) A stipulated final statement forthwith upon its filing; or~~

~~(4) The judge's certificate resolving disputed issues pursuant to subdivision (g) and all proposed statements, proposed corrections and additions, and stipulations of the parties forthwith upon filing the judge's certificate resolving disputed issues.~~

~~(i) [Return of copy cassettes] Upon signing a stipulated final statement, or upon receiving a copy of the judge's certificate resolving disputed issues, or upon receiving notice of the filing of the record in the reviewing court, or at the request of the reviewing court, trial counsel and any unrepresented party without counsel on appeal shall deliver the copy cassettes to the clerk of the superior court appellate department for the use of any counsel on appeal; or, if trial counsel is in the same law office as counsel on appeal, shall deliver the copy cassette to counsel on appeal and promptly file a notice with the appellate department stating that it has been delivered or will be delivered to counsel on appeal when the appeal is assigned.~~

~~(j) In lieu of the clerk's record on appeal specified in rule 183, the clerk shall transmit to the reviewing court the complete trial court file on the case with a copy of all docket entries in the trial court. The original or a copy of the docket entries shall be retained in the trial court. The file copy cassette shall be transmitted as part of the file.~~

~~(k) The provisions of rule 132 concerning augmentation and correction of the record apply. The reviewing court may order from the trial court the original sound recording to clarify any question concerning the trial court proceedings. The clerk of the reviewing court shall return the original sound recording to the trial court as soon as possible but no later than the time when the decision of the reviewing court is final.~~

~~(l) The provisions of rule 186 concerning extensions of time and relief from default apply to this rule.~~

~~(m) This rule does not limit a court's power to order a full verbatim transcript of the proceedings. If a transcript is ordered, this rule is inapplicable to the case.~~

Rule 188. Abandonment of appeal

~~An appellant may at any time abandon his appeal by filing a written abandonment thereof. Such abandonment shall be filed in the trial court if the record has not yet been filed in the superior court, or in the superior court if the record has been filed in that court. Upon the filing of a written abandonment in the trial court the jurisdiction of that court shall thereby be restored and it shall at once take such proceedings as may be necessary to enforce its judgment or order as if no such appeal had been taken. Upon the filing of such abandonment in the superior court, that court shall dismiss the appeal and issue its remittitur forthwith.~~

Comment. The subject matter of this rule is now covered by Rule 19.

Rule 189. Additions to record

~~On a sufficient showing by affidavit, or otherwise, that evidence was taken or proceedings were had in the trial court or that papers are there on file which are material to a disposition of the appeal and are not included in the record on appeal, and a showing of good cause why the same have not been included in said record, the superior court may authorize the trial judge to make a further certificate as to such evidence or other proceedings or papers, and direct the same, when so certified, to be added to the record.~~

Comment. The subject matter of this rule is now covered by Rule 12.

Rule 190. Hearings and dismissals

~~Appeals to the superior court in criminal cases shall be calendared, argued and determined, notice of hearings shall be given, and petitions for rehearing and answers thereto shall be filed and acted upon as prescribed in the rules adopted by the Judicial Council for appellate departments of the superior court.~~

~~If the appeal is not brought to a hearing within the time limited, or the appellant otherwise fails to prosecute it with diligence, or if the appeal is irregular in any substantial respect, the superior court may, on motion of the respondent or on its own motion, after written notice to the appellant, order it dismissed.~~

Comment. The subject matter of this rule is now covered by Rule 21.

Rule 191. Remittiturs

~~(a) [Issuance and transmission] Upon the expiration of the period during which a transfer may be ordered, unless a new trial is to be had in the superior court, the clerk of the superior court shall remit to the court from which the appeal was taken a certified copy of the judgment of the superior court and of its opinion, if any, and also all the original exhibits, orders, affidavits, papers and documents which were sent to said superior court in connection with said appeal, except the statement or transcript on appeal and the notice of appeal. After such certified copy of the judgment has been remitted to the court below, the superior court has no further jurisdiction of the appeal or of the proceedings thereon, and the lower court shall make all orders necessary to carry its judgment or order into effect or otherwise proceed in conformity to the decision on appeal.~~

~~(b) [Issuance forthwith] The court may direct the immediate issuance of the remittitur on stipulation of the parties.~~

~~(c) [Stay of issuance] The court, for good cause, may stay the issuance of the remittitur for a reasonable period.~~

~~(d) [Recall of remittitur] A remittitur may be recalled by order of the court on its own motion, on motion after notice supported by affidavits, or on stipulation setting forth the facts which would justify the granting of a motion.~~

Comment. The subject matter of this rule is now covered by Rule 25.